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VOLUME 44

REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF RHODE ISLAND

EDWARD C. STINESS
REPORTER

PROVIDENCE:

E. L. FREEMAN CO., PRINTERS

1922

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FEB 15 1924

RHODE 'SLAND REPORTS-VOL. XLIV.

These reports are published in accordance with the provisions of Chapter 277 of the General Laws of 1909 of the State of Rhode Island.

The cases reported include the decisions, opinions, and rescripts of the Supreme Court, involving questions of law, pleading, or practice, from June 28, 1921, to December 22, 1922.

EDWARD C. STINESS,

Reporter.

JUDGES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS.

CHIEF JUSTICE.

HON. WILLIAM H. SWEETLAND.

ASSOCIATE JUSTICES.

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CASES

HEARD AND DETERMINED

BY THE

SUPREME COURT OF RHODE ISLAND.

Pugh Brothers Co. vs. Paul Marano.

JUNE 28, 1921.

PRESENT: Sweetland, C. J., Vincent, Stearns, Rathbun, and Sweeney, JJ.

- (1) Trover and Conversion. Damages.
- In trover upon proof of conversion, of a chattel, if no evidence is presented as to its value at the time of conversion, the plaintiff is entitled to a verdict for nominal damages.
- (2) Trover and Conversion. Conditional Sale.
- Where under a conditional sale lease a series of notes was given to vendor by vendee, which were not paid and vendor accepted a second series of notes in substitution for the first series, as it clearly appeared that they were taken in renewal of the first series and not as payment, it did not have the effect of passing the title to the vendee.
- (3) Conditional Sale. Damages.
- Where the purchaser in a conditional sale converts the chattel the seller may recover in trover damages equal to the unpaid balance of the purchase price if the value of the chattel at the time of conversion equals or exceeds such balance, but if such value is less than the balance due the measure of damages is the value of the chattel, and plaintiff must show not only the balance due but also the value of the chattel at conversion in order that the jury may have sufficient data for the assessment of damages.

TROVER. Heard on exceptions of defendant and sustained.

SWEETLAND, C. J. This is an action of trover brought by John E. Pugh, doing business as Pugh Brothers Company, to recover the value of an automobile alleged to have been converted by the defendant.

The case was tried before a justice of the Superior Court sitting with a jury. At the conclusion of the evidence on motion of the plaintiff said justice directed a verdict for the plaintiff for \$145.55. The case is before us upon the defendant's exception to the action of said justice in directing a verdict for the plaintiff and also upon his exception to the refusal of said justice to direct a verdict for the defendant.

It appears that the plaintiff is a dealer in automobiles; that the automobile for the alleged conversion of which this action is brought was a second-hand machine on July 11. 1919, when it was delivered by the plaintiff to the defendant subject to the terms of a written contract for its conditional sale to the defendant; that in accordance with the terms of said written contract the defendant delivered to the plaintiff a series of promissory notes in payment for said automobile and in said contract it was agreed that "title to the car shall remain in Pugh Brothers Company until fully paid for including payment of any and all notes given on account thereof:" that when said promissory notes became due they were not paid by the defendant and the defendant then gave to the plaintiff, and the plaintiff accepted, a second series of notes in substitution for the series first given; that when the notes of the second series became due they were not paid and the plaintiff then took from the defendant a third series of notes in substitution for the second series: that the notes in the third series were not paid when due and the defendant then admitted to the attorney of the plaintiff that he had sold the automobile. This act on the defendant's part was contrary to the terms of the written agreement and constituted a conversion of the automobile. At the trial the plaintiff offered evidence of the conversion. and for proof of his damages the plaintiff relied solely upon evidence showing the amount of the defendant's unpaid

notes. The defendant offered no evidence and on motion the justice directed a verdict for the plaintiff for the amount due upon said notes.

The defendant's motion for direction of a verdict was

properly overruled. In support of the motion, and of the exception before us, the defendant urged that as the plaintiff had produced no evidence as to the value of the automobile at the time of the conversion the defendant should have a verdict in his favor. The defendant did not attempt to contradict the evidence that he had sold the automobile in violation of the terms of the contract and was guilty of (1) conversion. In trover, upon proof of conversion of a chattel, if no evidence is presented as to its value at the time of the conversion, the plaintiff is entitled to a verdict for nominal damages. The defendant further contended that the verdict should have been directed in his favor because the taking by the plaintiff of the second series of notes in law amounted to a payment of the first series and worked a conveyance of the title to the automobile from the plaintiff to him. This contention is not sound. The second series was clearly taken in renewal of the first and not as payment. It was not the intention of the parties that by this transaction the conditional sale should be converted into an absolute one, transferring the title from the seller to the purchaser, and it did not have that effect in law.

(2) We are of the opinion that the defendant's exception to the ruling of the justice directing a verdict for the plaintiff should be sustained. In Woods v. Nichols, 21 R. I. 537, and in the same case 22 R. I. 225, the court stated the proper measure of damages in a case of this kind, adopting the generally recognized rule. If the purchaser in a conditional sale converts the chattel sold, the seller may recover in trover damages equal to the unpaid balance of the purchase price if the value of the chattel at the time of the conversion equals or exceeds such balance. If at the time of conversion the value of the chattel is less than such balance the measure of damage is the value of the chattel. In Woods v. Nichols, 22

R. I. 225, the court explicitly stated that it "did not hold that the contract price was the value of the property but only that the plaintiff's interest in it could not exceed that amount." It is equally the law that, without further proof, the unpaid balance of the contract price cannot be taken as the value of the plaintiff's interest in the chattel. It follows that in this class of cases it is necessary for the plaintiff to show not only the balance due upon the contract but also the value of the chattel at the time of conversion in order that the jury may have sufficient data for the assessment of damages in the case, in accordance with the rule which this court has laid down regarding their proper measure. It was error for the Superior Court in the absence of all evidence tending to show the value of the automobile at the time of the conversion to direct the jury to find for the plaintiff for the amount due on the notes. Hall v. Nix, 156 Ala. 423; Moultrie v. Hill, 120 Ga. 730, at 733.

The defendant's exception to the ruling of the Superior Court directing a verdict for the plaintiff is sustained. His other exception is overruled. The case is remitted to the Superior Court for a new trial.

John H. McGough, Cooney & Cooney, for plaintiff. Pettine & DePasquale, for defendant.

FLORENCE R. RUBIN vs. OSCAR KLEMER.

JUNE 28, 1921.

PRESENT: Sweetland, C. J., Vincent, Stearns, Rathbun, and Sweeney, JJ.

(1) Breach of Promise of Marriage.

In an action to recover for breach of promise of marriage while the main question is how much damage plaintiff has suffered, the amount of damage is dependent to some extent upon the amount of property defendant had, and in addition to the loss of benefits which plaintiff would have enjoyed as the wife of defendant, she is entitled to recover her financial loss and any humiliation and any impairment of health due to defendant's refusal to keep his promise to marry.

Assumpsit for breach of promise to marry. Heard on exceptions of both parties and all exceptions overruled.

RATHBUN, J. This is an action of assumpsit for breach of promise of marriage. The trial in the Superior Court resulted in a verdict for the plaintiff for \$5,560. The defendant made a motion for new trial on the usual grounds and the trial court refused to disturb the findings of the jury that the defendant was liable but held that the amount of damages awarded was not supported by the evidence and granted a new trial unless the plaintiff should remit all damages in excess of three thousand dollars. The plaintiff did not file a remittitur but excepted to the decision of said The case is before this court on plaintiff's exception to the decision granting a new trial and on defendant's exception to the refusal of said justice to grant a new trial without condition; also on certain exceptions of the defendant taken to the rulings of the court during the trial.

The defendant was introduced to the plaintiff some time in December, 1919, and the parties became engaged on January 8, 1920; on February 14, 1920, the defendant gave the plaintiff a diamond engagement ring of the value of five hundred dollars, and on June 24, 1920, this action was commenced.

The respondent, who was a widower, was the father of a female child six years of age. He testified that although he had affection for the plaintiff his main purpose in contemplating matrimony was to obtain a wife who would care for his child and that when he promised to marry the plaintiff it was understood and agreed as a part of the contract of marriage that the plaintiff after the marriage would assume the care of his child. He further testified that a few days after May 25, 1920, the plaintiff told him that she did not intend to take the responsibility of caring for his child and that after the marriage it would be necessary for him to place the child in a home and he replied: "If you don't want my child, then you don't want me;" that after this conversation

his attentions to the plaintiff ceased. Plaintiff denied telling the defendant that she would not care for the child and that it would be necessary to place the child in a home. Whether the plaintiff told the defendant that she did not propose to keep that part of her agreement which relates to the care of the child was clearly a question of fact for the jury and the finding of the jury on this issue has the approval of the trial court.

The trial justice in passing upon defendant's motion for a new trial filed the following decision: "It seems highly probable, if not reasonably certain, that the jury rated defendant's possessions higher than warranted by the weight of the evidence. New trial granted unless plaintiff within fifteen days of notice of this decision remit all damages in excess of \$3,000."

The plaintiff now argues that it is immaterial whether the defendant has much or little property and that the only question is how much damage has the plaintiff suffered. On this phase of the case the main question, of course, is how much damage has the plaintiff suffered by reason of defendant's breach of the contract to marry. amount of the plaintiff's damage is dependent to some extent upon the amount of property which the defendant had. the defendant was possessed of great wealth it is reasonable to assume that the plaintiff, had she married the defendant, would have enjoyed more of the comforts of life and a higher social position than she would have enjoyed if he had been a man of moderate means. 9 C. J. 372. At the trial the plaintiff contended that defendant by refusing to keep the contract to marry had prevented her from enjoying the benefits which his property would have given her and to show the amount of her damage in this particular she introduced testimony relative to the amount of property owned by the defendant.

Plaintiff testified that she, relying upon defendant's promise to marry her, resigned her position as a saleslady with the result that she was out of employment for a period

of seven months and lost wages to the amount of \$420; that in preparing for a wedding she expended the sum of \$825 in the purchase of certain articles which she would not have purchased had she not expected to marry the defendant. She admits, however, that some of this expenditure was not a total loss.

In addition to the loss of benefits which she would have enjoyed as wife of the defendant she is entitled to recover her financial loss and for any humiliation and any impairment of health due to the defendant's refusal to keep his promise to marry her. 9 C. J. 372.

The engagement was not of long duration. Within about five months after the defendant was introduced to the plaintiff the engagement was broken and within one month thereafter this action was commenced. During the trial no reflection was cast upon plaintiff's character. Although some insinuations were made during the trial that the defendant was a man of wealth no evidence was introduced to warrant a finding that he had any considerable amount of property. The defendant was a widower and had a small child. The plaintiff had agreed to assume the care of this child. She has been relieved of this responsibility. The trial court evidently considered that the damages awarded were grossly excessive.

We have examined all the evidence and are of the opinion that the sum of three thousand dollars, arrived at by said justice, is liberal compensation for all damage which the evidence fairly shows that the plaintiff suffered by reason of defendant's refusal to marry her.

The exceptions of both the plaintiff and the defendant are overruled. The case is remitted to the Superior Court for a new trial unless the plaintiff within fifteen days after the filing of this opinion shall in writing file with the clerk of the Superior Court her remittitur of all of said verdict in excess of three thousand dollars. If on or before said date the plaintiff files such remittitur the Superior Court is directed

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to enter judgment for the plaintiff for three thousand dollars.

Cushing, Carroll & McCartin, for plaintiff. McGovern & Slattery, for defendant.

STAR BRAIDING COMPANY vs. STIENEN DYEING Co., Inc.

JUNE 28, 1921.

PRESENT: Sweetland, C. J., Vincent, Stearns, Rathbun, and Sweeney, JJ.

(1) Bankruptcy. Stay of Proceedings in State Court.

Under the provisions of the U. S. Bankruptcy Act of 1898, Section 11, a suit which is founded upon a claim from which a discharge would be a release, and which is pending against the alleged bankrupt at the time of the filing of a petition in bankruptcy against him, must be stayed until after an adjudication or a dismissal of the petition. The language of the act is peremptory, and the duty of the court to grant the stay is not affected by the fact that the plaintiff had obtained a lien by attachment upon defendant's personal property made more than four months prior to the filing of bankruptcy proceedings.

- (2) Bankruptcy. Special Judgment. Stay of Proceedings.
- Although a defendant receives a discharge in bankruptcy, the suit may still proceed to a qualified or special judgment against him, to permit plaintiff to enforce his lien or to bring suit against those secondarily liable.
- (3) Bills of Particulars.

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Where a bill of particulars set out charges for goods sold by plaintiff to defendant, it was error to permit plaintiff to introduce evidence of work performed upon the goods at defendant's request, as plaintiff should have been restricted in its proof to the claims set out in its bill.

Assumpsit. Heard on exceptions of defendant and sustained.

SWEETLAND, C. J. This is an action of the case in assumpsit. The declaration alleges an indebtedness on book account and contains other common counts.

The case was tried before a justice of the Superior Court sitting with a jury. At the conclusion of the evidence said justice directed a verdict for the plaintiff in the sum of \$647.56, the same being the full amount of its claim. The

cause is before us upon the defendant's exception to this action of said justice and upon its exceptions to certain rulings of said justice made in the course of the trial.

The defendant presented to said justice a certified copy of the records of the United States District Court for the Southern District of New York from which it appeared that on November 24, 1920, a petition in bankruptcy was filed against the defendant in said district court; that a temporary receiver of the defendant's assets was appointed and that the bond required of such receiver had been approved and filed in said court. The defendant then moved in writing that said justice stay this action in the Superior Court under and by virtue of Section 11 of the United States bankruptcy law. Section 11 of the National Bankruptcy Act of 1898 is as follows: "A suit which is founded upon a claim from which a discharge would be a release, and which is pending against a person at the time of the filing of a petition against him, shall be stayed until after an adjudication or the dismissal of the petition; if such person is adjudged a bankrupt, such action may be further stayed until twelve months after the date of such adjudication, or, if within that time such person applies for a discharge, then until the question of such discharge is determined." Said iustice denied the motion for a stay and proceeded to try To this ruling of the justice the defendant exthe case. cepted and is insisting upon said exception before us. The plaintiff seeks to support the action of said justice upon the authority of statements contained in the text of Collier on Bankruptcy, 12th ed. Vol. 1, p. 291, and in certain federal cases cited by the author in his footnotes to the effect that the power of the court to stay a suit against a bankrupt is discretionary. The stay to which the author and the cases cited by him have reference is not the stay sought by this defendant on its motion, but a stay after an adjudication of bankruptcy or one, in the nature of an injunction, issued by a federal court to restrain an action against a bankrupt in a state court, or a stay in an action begun against a

bankrupt after the filing of a petition in bankruptcy against him. The power to grant such stays is discretionary, but none of them is within the provisions contained in the first part of Section 11. Until after an adjudication or dismissal of the petition against an alleged bankrupt a suit which is founded upon a claim for which a discharge would be a release and which is pending against the alleged bankrupt at the time of filing such petition must be stayed. Of such nature is the plaintiff's claim and such was the condition of his suit at the time of defendant's motion for a stay. language of the bankruptcy act is peremptory. The action should have been stayed. In Collier on Bankruptcy, 12th ed. Vol. 1, p. 287, the author says: "Stays of suits under the present law are, strictly speaking, confined to actions pending at the time of the bankruptcy. They are mandatory if before the adjudication and discretionary after it The stay of suits against the bankrupt pending the bankruptcy proceeding is absolutely necessary to give effect to the present bankruptcy act." In In Re Geister, 97 Fed. 322, the court said: "The bankrupt who is the defendant in the state court should file in that court a proper pleading setting forth the pendency of the proceedings in bankruptcy, and, based thereon, should ask a stay as provided for in Section 11; and, upon being thus informed of the pendency of the proceedings in bankruptcy, it will become the duty of the state court to grant the stay prayed for." Rosenthal v. Nove, 175 Mass. 559.

The claim of the plaintiff that the Superior Court was not properly informed of the pendency of the bankruptcy proceedings appears to us to be without weight. The allegations of the defendant's motion supported by the certified copy of the records of the bankruptcy court required the Superior Court to refrain from proceeding with the trial of the cause.

Nor does the fact, upon which the plaintiff lays stress, that it had obtained a lien by attachment upon the defendant's personal property made more than four months prior to the

filing of bankruptcy proceedings, which lien is not discharged by the bankruptcy, relieve the Superior Court from complying with the mandatory provisions of the bankruptcy act. The plaintiff's lien would not have been lost by the stay. a stay had been granted, after the adjudication or the dismissal of the bankruptcy petition the Superior Court might remove the stay and permit the suit to proceed. As was held in Butterick v. Bowen, 33 R. I. 40: although the defendant receives a discharge in bankruptcy, which he sets up in a plea puis darrien continuance the suit may still proceed to a qualified or special judgment against the defendant for the purpose of permitting the plaintiff to enforce his lien or for the purpose of enabling the plaintiff to bring suit against sureties on a bond given to release such attachment. Said justice of the Superior Court was in error in denying the motion for a stay.

Prior to the time of trial the plaintiff on the order of the Superior Court had filed a bill of particulars of its claim.

The items of this bill appear to be charges for goods sold by the plaintiff to the defendant. At the trial the plaintiff was permitted to introduce evidence of work performed by it upon said goods for the defendant at the defendant's request. To this ruling of the justice the defendant excepted. The plaintiff should have been restricted in its proof to the claims set out in its bill.

The action of said justice in directing a verdict for the plaintiff was unwarranted.

All of the defendant's exceptions are sustained. The case is remitted to the Superior Court for such further proceedings, in accordance with this opinion, as are in conformity with the bankruptcy act in the present condition of the bankruptcy proceedings against this defendant.

Wilson, Churchill & Curtis, for plaintiff.

Ernest P. B. Atwood, for defendant.

BEATRICE B. BEVAN vs. ERNEST E. BEVAN.

JUNE 28, 1921.

PRESENT: Sweetland, C. J., Vincent, Stearns, Rathbun, and Sweeney, JJ.

(1) Divorce. Continued Drunkenness.

"Continued drunkenness" as a cause for divorce signifies gross and confirmed habits of intoxication, and the charge is not sustained by proof of the occasional abuse of liquor by a respondent.

PETITION FOR DIVORCE. Heard on exceptions of respondent and sustained.

STEARNS, J. This is a petition for divorce brought by the petitioner against the respondent, her husband, which was heard by a justice of the Superior Court and decision was given therein for an absolute divorce in favor of the petitioner on the ground that the respondent had been guilty of continued drunkenness.

The cause is now in this court on the respondent's bill of exceptions by which exception is taken to the decision of the Superior Court.

From the transcript it appears that, at the conclusion of the hearing, the trial justice stated that he did not think there was any rule that could be laid down in a divorce case as to what was continued drunkenness; that it was a question whether a man was fulfilling the responsibilities that he took on himself when he married, and that was the only test there was, and if his habits so interfered with his marriage responsibilities and the devotion he ought to give to his family that was "continued drunkenness" within the meaning of the statute. The trial justice held the case and within a few days rendered a decision granting a divorce to the petitioner on the ground of continued drunkenness. No rescript was filed in the case. The trial justice was in error in his statement of the law applicable to the case.

In Gourlay v. Gourlay, 16 R. I. 705 (1890), this court, in speaking of the meaning of the phrase "continued drunkenness" as used in the statute "Of Divorce" (now Chapter

247, Gen. Laws, said: "To sustain this charge, when it is alleged as one of the grounds upon which a divorce is claimed, the proof should be sufficiently clear to convince the court that the respondent's habits of drunkenness were confirmed and continued; in other words, that he had become a drunkard, an habitual drunkard, the terms meaning the same thing. . . . The words 'continued drunkenness' are used in their ordinary sense in our statutes, and signify gross and confirmed habits of intoxication." construction of the statute was thus established in this State and we think the case has been quite generally followed in other jurisdictions, where continued drunkenness is a ground for divorce. In the case at bar it appears that the respondent was accustomed to use alcohol regularly and that on some occasions he was under the influence of liquor to a greater or less degree. The respondent held a responsible position with a well-known business firm and attended to his duties regularly and in a manner satisfactory to his employers. The evidence as to his occasional abuse of liquor falls far short of the degree of proof required to establish the fact of continued drunkenness and it is evident that the trial court in weighing the testimony applied an incorrect rule of law in regard to the same. The exception of the respondent to the decision of the trial justice is sustained.

Opportunity will be given the petitioner to appear on Tuesday, July 5, 1921, at nine o'clock a. m., Standard time, and show cause why an order should not be made remitting the case to the Superior Court with direction to dismiss the petition.

Joseph C. Cawley, for petitioner. McGovern & Slattery, for respondent.

Frank A. Williams vs. Howard V. Allen, Town Treas.

JUNE 28, 1921.

PRESENT: Sweetland, C. J., Vincent, Stearns, and Rathbun, JJ.

- (1) Requests to Charge. Trial.
- The multiplication, without necessity of requests to charge is a hindrance to the orderly procedure of a trial and tends to create confusion and to obscure the real issues in a case.
- (2) Public Highway. Duty of Town to Repair.
- To show the establishment of a public highway under the common law, the following facts must be proved: (a) the right of the public to use the highway, established by immemorial or long continued public use; (b) the liability of the town to repair the highway, which is created only by some act of acquiescence or adoption by the town, as by assumption by the town of the duty to repair the way and the actual repairing of the same from time immemorial.
- (3) Public Highways. Repairs. Municipal Corporations.
- The significance of such repairs as were made by a town to a small country highway should be judged with reference to the nature and extent of repairs customarily made by the town on other similar highways at different times.
- (4) Municipal Corporations. Repairs to Public Highways.
- Of necessity in many cases adequate proof of immemorial repair can only be made by proof of a number of different and separate acts by the town.
- (5) Municipal Corporations. Public Highways. Constructive Notice of Defects.
- A town is held liable for injury to one traveling upon a public highway if it had reasonable notice of the defect, or might have had notice by the exercise of proper care and diligence on its part.
- (6) Public Highways. Municipal Corporations. Maintenance of Traveled Ways.
- Charge that a town was not required to work a road to its full width, but was only required to keep it safe for travelers for a suitable width and that having taken a view of the way it was for the jury to decide whether the way had been properly maintained for a sufficient width, was correct.
- (7) Trial. Special findings.
- It is not the right of a party to have a special finding on every issue in a case, and it was not error for the court to refuse to submit special findings, where the decision of such proposed issues would not be decisive of plaintiff's right nor necessarily affect the general verdict.

Trespass on the Case for negligence against a town. Heard on exceptions of defendant and overruled.

R. I.]

STEARNS, J. This is an action on the case for negligence, brought against the town of Warwick to recover damages for personal injuries suffered by plaintiff which were caused by a defect in a highway in said town. The highway, now known as Church avenue and formerly as Meeting House Lane, is a dirt road about a mile and a half in length, the traveled part of which is from six to eight or ten feet in width; it runs east and west between Warwick avenue and West Shore Road, two main line highways which run north and south.

On the afternoon of July 23, 1917, plaintiff, a grocer, was driving his horse and delivery wagon on Church avenue. As he approached the junction of Warwick avenue an automobile truck turned into Church avenue from Warwick As the traveled and worn part of the way was not sufficiently wide for the vehicles to pass thereon, plaintiff turned partially out of the traveled way to his right onto the grass at the side of the dirt road. The driver of the truck also turned partially out of the traveled part of the way to his right and onto the grass on his side of the road, each driver giving to the other a fair part of the traveled way. Both vehicles were proceeding at a proper rate of speed. After the vehicles had passed each other, as the plaintiff started to return to the middle of the dirt road, the front right-hand wheel of his wagon struck a large stump or log which was lying loose on the ground, and as a consequence plaintiff was thrown to the ground and was seriously injured. The stump was three or four feet in length, twelve to fourteen inches thick on one end, tapering to five or six inches at the smaller end which was the end near the road. It was lying at right angles with the dirt road, about eighteen inches from the edge of the dirt road, and was covered with grass and bull briars. It appears that one Smith, the owner of the land adjacent to this part of the way, in the spring of the year preceding the accident, had been blasting stumps on his land and that a number of stumps and logs at that time had been blown into the highway. Some of the stumps were removed but it was claimed that this particular stump had not been removed but had been left at the side of the road.

The case was tried by a jury who found a verdict for the plaintiff. The defendant's petition for a new trial was denied by the trial justice. The case is now in this court on defendant's bill of exceptions.

At the trial defendant presented to the trial justice twentyfive requests for instructions to the jury, many of which the trial justice refused to give to the jury. Defendant took some seventy exceptions, a few only of which were waived in this court. Many of the exceptions are of no importance; others were taken to the refusal of the court to charge in the precise form requested by defendant, although the court had correctly instructed the jury on the questions of law in issue.

The multiplication, without necessity, of requests to the court to give instructions to the jury is a hindrance to the (1) orderly procedure of a trial by jury and tends to create confusion and to obscure the real issues in a case. In Faccenda v. R. I. Co., 43 R. I. 199, this court expressed its disapproval of such procedure and called attention to some of the evils thereof. In the circumstances there is no occasion to examine each exception in detail.

The defendant in its brief has summarized its objections

and we will consider the general questions as thus presented. Defendant claims that the finding of the jury that Church avenue was a public highway which the town was obliged to keep in repair, was against the law and the evidence. We find no merit in this objection. It was claimed that this was a public highway established under the common law. To establish a right of recovery, plaintiff was required (2) to prove: (a) the right of the public to use the highway, established by immemorial or long continued public use; (b) the liability of the town to repair the highway, which is created only by some act of acquiescence or adoption by the town, as for example the assumption by the town

R. I.1

to repair.

of the duty to repair the way and the actual repairing of the same from time immemorial. State v. Town of Cumberland, 6 R. I. 496; Hampson v. Taylor, 15 R. I. 83; Stone v. Langworthy, 20 R. I. 602; Eddy v. Clarke, 38 R. I. 371. The evidence of public user was strong and convincing. The evidence of public maintenance was convincing although not so strong as the evidence of public user. Church avenue is a small country highway. The (3) significance of such repairs as were made very properly should be judged with reference to the nature and extent of

repairs customarily made by the town on other similar highways at different times. Of necessity in many cases ade(4) quate proof of immemorial repair can only be made by proof of a number of different and separate acts by the town. The town for years had opened up this avenue for travel after heavy snowstorms. This action alone is not sufficient to establish the assumption by the town of the duty to repair but considered in connection with the evidence of repairs actually made or authorized by the town, with evidence tending to show that the town for years had included Church avenue in one of its highway districts, and evidence tending to show that an abutting owner had been assessed for a road tax for repairs on this way, such combined evidence was sufficient proof of the assumption by the town of the duty

Defendant also contends that the jury was misled by one part of the charge of the court in which the court charged that the jury might consider whether or not the town had recognized the way as a public highway. From the context, as well as from other parts of the charge, we think it is clear that the jury was not misled. The court charged to hold the town liable, plaintiff was required to prove that immemorial repairs had been made by the town. There was no error in this respect.

Defendant claims that the evidence is not sufficient to prove constructive notice. The town is held liable if it had "reasonable notice of the defect, or might have had notice

thereof by the exercise of proper care and diligence on its (5) part." (Chap. 46, Sec. 15, Gen. Laws.) Defendant argues that the obstruction was latent and that to hold it to be the duty of the town to find all such obstructions by either mowing or cutting the vegetation at the side of the road would impose an unfair burden upon the town. Although the obstruction in the summer may have been latent, in the sense that it was hidden from view at that season, it was not hidden in the winter months. There is evidence that this stump had been lying on the ground in the same place near the traveled part of the way for more than a year prior to the accident and had been seen by at least one witness many times; that during the fall, winter and early spring the stump was plainly visible; in the summer it was almost entirely covered by grass and brambles. Opposed to this is the testimony of a number of witnesses, who passed through this way at different times, that they had never noticed the log. This issue was one of fact for the jury, and the evidence is sufficient to prove constructive notice. Another general objection is that the jury was improperly

instructed in regard to the duty of the town in the maintenance of traveled ways. The trial justice in substance charged the jury that the town was not required to work a road to its full width, but was only required to work the road and to keep it safe and convenient for travelers for a suitable width; that, having taken a view of the way, it was for the jury to decide whether in the particular case the way had been properly maintained for a sufficient width. The question was one of fact for the jury and the instruction to the jury was correct. Foley v. Ray, 27 R. I. 127; Taylor v. Winsor, 30 R. I. 44.

Defendant excepts to the refusal of the trial justice to submit two special findings to the jury.

1. Was the stump or log of wood left within the limits of Church avenue by Patrick J. Smith or anyone employed by him? 2. If the preceding question is answered in the affirmative did said stump or log of wood remain within the limits of Church avenue up to the time of the accident to the plaintiff?

Prior to the trial defendant notified Smith to appear and defend the suit and stated to him it was informed that the stump had been left by said Smith in the highway. Smith's counsel was present throughout the trial but took no part Defendant's contention is that if it is forced to pay it is entitled to reimbursement, and in support of its position cites Bennett v. Fifield, 13 R. I. 139; Hill v. Bain, 15 R. I. 75; City of Pawtucket v. Bray, 20 R. I. 17. In none of these cases was the question of the existence of the public highway in issue. But in the case at bar that was one of the fundamental issues and, as stated in Pawtucket v. Bray, the only ground upon which the alleged wrongdoer (in this case Smith) could assume the defense of the suit against the town, is the right of the town to call on him for reimbursement. The defendant's position is inconsistent. It opposes plaintiff's claim on the ground that the way is not a public highway. At the same time and at the same trial it seeks (7) to compel Smith to defend the case and to hold him liable in case of a recovery by plaintiff, on the ground that the way is a public highway. So far as plaintiff's right to recover is concerned it was not necessary to prove that the log was left in the highway by Smith. If the log had been there for such a length of time in such condition as to charge the town with constructive notice, that was sufficient for plaintiff's case. By Chapter 291, Sec. 6, Gen. Laws, it is provided that the court may, and upon request of either party shall, direct the jury to return a special verdict upon any issue submitted to the jury. Such issues shall be settled by the trial justice and either party may except to his rulings thereon. In each case, in addition to the special findings, the jury shall find a general verdict. One purpose of this provision is to direct the attention of the jury specifically to the decision of an issue which has a direct relation to the

general verdict and which is of such importance that the correctness of the general verdict may properly be tested by the propriety of the special finding. But it is not the right of a party to have a special finding on every issue in a case. In the case at bar the decision of neither of the proposed issues would be decisive of plaintiff's right, nor would such decision necessarily affect the general verdict. In Reid v. R. I. Co., 28 R. I. 321, which was an action for negligence, the trial court at the request of counsel submitted three special findings to the jury in addition to the main issue in the case. The jury found a general verdict in favor of the plaintiff and in addition therein stated that they were unable to answer the special finding. It was held that although the court erred in not insisting upon a special finding on the issues submitted to the jury, yet as the special issues although relevant were not material to or decisive of the main issue, such error was not reversible error. exceptions to this action of the trial court are overruled.

All of the other exceptions are overruled and the case is remitted to the Superior Court for judgment on the verdict.

Washington R. Prescott, Frank Steere, for plaintiff. Harold R. Curtis, for defendant.

MARY L. MORRELL vs. ALPHONSINE J. LALONDE et al.

JULY 1, 1921.

PRESENT: Sweetland, C. J., Vincent, Stearns, Rathbun, and Sweeney, JJ.

(1) Liability Insurance. Actions. Constitutional Law.

Pub. Laws, 1915, cap. 1268, § 9, providing that "every policy hereafter written insuring against liability for personal injuries—shall contain provisions to the effect that the insurer shall be directly liable to the injured party . . . to pay him the amount of damages for which such insured is liable. Such injured party . . . in his suit against the insured may join the insurer as a defendant, in which case judgment shall bind either or both the insured and the insurer; or said injured party . . . after having obtained judgment against the insured alone, may proceed on said judgment in a separate action against said insurer: Provided, however,

that payment in whole or in part of such liability by either the insured or the insurer shall to the extent thereof, be a bar to recovery against the other, of the amount so paid," is not obnoxious to Cons. R. I., Art. I, sec. 15. "The right of trial by jury shall remain inviolate," nor to Cons. U. S. Art. XIV of Amendments, Sec. 1, "nor shall any state deprive any person of life, liberty or property without due process of law," nor to Cons. R. I., Art. I, Sec. 10, in that its enforcement will deprive the defendant of its property otherwise than by the law of the land.

TRESPASS ON THE CASE for negligence. Certified under Gen. Laws, cap 298, § 1, on constitutional questions.

SWEENEY, J. This case is before the court for hearing and determination of constitutional questions certified by the Superior Court in accordance with the provisions of Section 1, Chapter 298, Gen. Laws, 1909.

The questions are brought upon the record by demurrer to the declaration.

April 8, 1920, the plaintiff commenced an original action of trespass on the case for negligence by writ issued out of the Superior Court against the defendant Lalonde. After this writ and the declaration were duly entered in court, upon motion of the plaintiff, an order was entered permitting the plaintiff to add and join as party defendant the United States Fidelity & Guaranty Company, a foreign corporation doing business in this State under the provisions of Chapter 283 of said General Laws; and it was further ordered that the writ and declaration be amended by making said company a party defendant and that said company be notified of its joinder as party defendant. Due service of said order was made upon the insurance commissioner of this State.

The amended declaration was filed October 1, 1920, and alleged that April 18, 1920, the defendant Lalonde was a practicing physician; that he was engaged by the plaintiff to treat her professionally; and that on account of his negligence he did not properly treat her, whereupon she sustained serious personal injuries and damage.

The declaration also alleges that prior to said date the defendant company had issued to said Lalonde its policy of

insurance, subject to the provisions of Section 9, Chapter 1268, Public Laws, 1915, insuring him against liability for personal injuries; that said policy was in full force and effect at the time said Lalonde negligently treated said plaintiff; that said policy covered any claim for personal injuries received by the plaintiff by said negligent treatment of said Lalonde; and that said company is directly liable to pay to the plaintiff the amount of damages which said Lalonde is liable to pay to her.

The defendants filed separate demurrers to the amended declaration, that of Lalonde stating six specific grounds and that of the company stating eight grounds. Each demurrer raised constitutional questions and these questions have been certified to this court. The questions raised by Lalonde's demurrer are as follows:

- 1. Is Section 9 of Chapter 1268 of the Public Laws of the State of Rhode Island, passed at the January Session of the General Assembly of 1915, unconstitutional in that its enforcement will deprive the defendant Lalonde of his right to trial by jury in violation of Section 15 of Article I of the Constitution of the State of Rhode Island?
- 2. Is said section also unconstitutional in that its enforcement will deprive the defendant Lalonde of his liberty and property without due process of law in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States?

The questions raised by the company's demurrer are the same with the following additional one:

Is said section unconstitutional in that the enforcement thereof will deprive said defendant of its property otherwise than by the law of the land in violation of Section 10 of Article I of the Constitution of Rhode Island?

So much of said Section 9 as is material to this case is as follows: "Every policy hereafter written insuring against liability for personal injuries . . . shall contain provisions to the effect that the insurer shall be directly liable to the injured party . . . to pay him the amount of

damages for which such insured is liable. Such injured party . . . in his suit against the insured, may join the insurer as a defendant, in which case judgment shall bind either or both the insured and the insurer; or said injured party, . . . after having obtained judgment against the insured alone, may proceed on said judgment in a separate action against said insurer: *Provided*, however, that payment in whole or in part of such liability by either the insured or the insurer shall, to the extent thereof, be a bar to recovery against the other of the amount so paid; and provided, further, that in no case shall the insurer be liable for damages beyond the amount of the face of the policy.

"All policies made for the insurance against liability described in this section shall be deemed to be made subject to the provisions hereof, and all provisions of such policies inconsistent herewith shall be void."

This statute has been construed by this court in the case of Dillon v. Mark, 43 R. I. 119, 110 Atl. Rep. 611, in which the court held that a foreign insurance company was properly joined as defendant with the insured charged with negligence resulting in personal injury to the plaintiff. In discussing this statute, the court said: "The language used is plain and unambiguous, the intention of the legislature is manifest therein and there is no occasion to resort to the title of the act or any other sources to discover either the meaning or the intent of the statute. Having provided for the rights of an employee as against the employer and insurer, provision is then made by Section 9 for the protection of persons who sustain personal injuries for which those who are liable have insured themselves against liability. No distinction is made in the act between domestic and foreign insurance companies: both, if they choose to do business in this State, must conform to the law and are only authorized to issue policies in accordance with the law and subject to the provisions thereof." After opinion, the defendant filed a motion to reargue the case. The motion stated, among other things.

that the statute as construed by the court effected a radical and surprising change in the pleading and practice of common law actions for damages for personal injuries; that it enabled judgment to be entered in tort actions against an insurance company without service of process made on the real defendant, although the relation between the company and the real defendant was contractual; that it permitted the joining in one action defendants subject to different liabilities; and that the plaintiff's attorney would have an opportunity to show the jury that the real defendant was insured. The motion to reargue was denied, the court saying, "This motion does not suggest any matter which was not fully considered and passed upon by the court before delivering its opinion."

The same argument is made by the defendants in the present case, but it is without weight. The danger apprehended on account of joining the defendants in one action is more imaginary than real, and the court cannot assume that a jury will not give each of the defendants a fair and impartial trial; or that the attorney appearing for the plaintiff would be guilty of improper practice during the trial of the case for the purpose of prejudicing the jury against either or both of the defendants.

It is well established that the State may, at any time, alter the laws regulating procedure or practice and provide new remedies for the attainment of justice. In point, is the important law abrogating the defenses, against employees of contributory negligence, the negligence of a fellow servant, and that the employee had assumed the risk of injury.

The defendants claim that said law violates Section 15, Article I of the Constitution of this State which provides that, "The right of trial by jury shall remain inviolate."

In the case of Mathews v. Tripp, 12 R. I. 256, at page 258, Chief Justice Durfee said: "Trial by jury is a well known kind of trial. The right of trial by jury, as secured by the Constitution, is in our opinion simply the right to that kind of trial. And the right remains inviolate so long as the jury

continues to be constituted substantially as the jury was constituted when the Constitution was adopted, and so long as all such cases as were then triable by jury continue to be so triable without any restrictions or conditions which materially hamper or burden the right."

In Mathewson v. Ham, 21 R. I. 311, at page 316, the court said: "The legislature has the right to impose reasonable conditions, in its discretion, upon parties claiming jury trial, and has the right to vary those terms and conditions, from time to time, according to the varying exigencies of different cases."

As the enactment of said section was well within the power of the General Assembly, and does not deprive the defendants of the "right of trial by jury," the defendants' claim that the section is unconstitutional cannot be sustained.

The defendants also claim that said section violates the Constitution of the United States, Fourteenth Amendment, Section I, which provides: "nor shall any state deprive any person of life, liberty, or property without due process of law", but this claim is untenable.

In the case of Cross v. Brown, Steese & Clarke, 19 R. I. 220, this court said: "But what is due process of law except the observance of those general rules established in our system of jurisprudence for the security of private rights; i. e., a trial or proceeding in which the rights of the parties, after notice and opportunity to be heard shall have been duly given, shall be decided by a tribunal appointed by law and governed by the rules of law previously established?"

In the case of Carr v. Brown, 20 R. I. 215, the court said: "The words 'due process of law' mean a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights."

As the defendants have had ample notice of the action against them and of its nature, and have appeared before a court of competent jurisdiction on clearly defined issues of fact to be submitted to a jury, they cannot reasonably claim that they are liable to be deprived of "property without due process of law."

The defendants claim that said section radically changes the practice and procedure in this State but this court cannot pass upon the question of the wisdom or expediency of the change made by the provisions of said section.

For the reasons previously stated, we find no merit in the remaining claim of the defendant company that said section is unconstitutional as being in violation of Section 10 of Article I of the Constitution of this State.

Our decision is that Section 9, Chapter 1268, Public Laws, 1915, does not violate Sections 10 and 15, Article I of the Constitution of Rhode Island or Section 1 of the Fourteenth Amendment to the Constitution of the United States. All of the questions certified to this court are answered in the negative, and the papers in the case are sent back to the Superior Court, with the decision of this court certified thereon, for further proceedings.

Curran & Hart, for plaintiff. Huddy, Emerson & Moulton, for defendant.

JOHN E. COLLETTE vs. EARL G. PAGE.

JULY 1, 1921.

PRESENT: Sweetland, C. J., Vincent, Stearns, Rathbun, and Sweeney, JJ.

(1) Automobile. Liability of Bailor to Third Person.

One keeping automobiles for public hire, who lets an automobile to a person to run, which he knew or by the exercise of reasonable care should have known was in an unsafe condition on account of loose bolts, thereby rendering the automobile ungovernable while being driven on the highway is responsible for damage caused to a third person on the highway by the automobile, subject to the rules relating to proximate cause and contributory negligence.

Trespass on the Case for negligence. Heard on exception of plaintiff and sustained.

Sweeney, J. This is an action of trespass on the case for negligence on account of a collision between the automobiles of the plaintiff and the defendant. Demurrer to the amended declaration was sustained by a justice of the Superior Court and the plaintiff has brought the case to this court by his exception.

The declaration contains three counts and the third one avers that the defendant was the keeper of a public garage, letting automobiles for public hire in said city; that he, or his servant, negligently rented or let an automobile to a person full well knowing, or by the exercise of reasonable care and diligence should have well known, that the same was in a bad, unsafe, and dangerous state of repair on account of some bolts being loose, which ordinarily made the radius rod of said automobile secure, so that, while it was being driven by said person on a public highway in said city, it became ungovernable and a menace to the safety of the public and ran into the automobile of the plaintiff, then being driven upon said highway, and damaged it.

The facts are not fully set forth in the first and second counts because it does not appear in either of them whether the defendant, his agent or a bailee was operating the automobile at said time.

The defendant filed three grounds of demurrer to the declaration claiming (1) that the facts stated gave rise to no duty from the defendant to the plaintiff; (2) that an automobile is not an imminently dangerous article, and no privity of contract existed between the defendant and the plaintiff; and (3) that it is not alleged that the defendant actually knew of the defective condition of the automobile.

The dermurrer was sustained under authority of the case of *McCaffrey* v. *Mossberg Mfg. Co.*, 23 R. I. 381, in which this court held that the maker of a machine, which he sold to another, is not liable to a third person for injuries received by him arising from negligence in the construction of the machine; because the machine was not imminently dan-

gerous nor was its maker guilty of deceit or fraud in selling it having knowledge of its defect. In so holding, the court said, on page 386, "The third class of cases relating to the sale of a thing not in its nature dangerous rests on the principle that as to such things there is no general or public duty, but only a duty which arises from contract, out of which no duty arises to strangers to the contract."

In the case at bar, the function of the radius rod is not alleged in either of the counts but it was stated in argument that it is an important part of the steering gear of the automobile. The case has been argued upon the assumption that the defendant's automobile was in charge of an independent bailee.

This court has held that an automobile is not an instrumentality dangerous per se so as to make the owner liable for injuries resulting from the negligence of his servant while driving the automobile for his own pleasure and not upon the owner's business; Colwell v. Ætna Bottle & Stopper Co., 33 R. I. 531; but it is obvious that it may become a dangerous instrumentality when driven upon a public highway in a reckless or negligent manner, or when it has inadequate brakes or its direction cannot be controlled by the steering gear; and it has been held that an automobile may be so out of repair as to be a dangerous instrumentality. Texas Co. v. Veloz, 162 S. W. Rep. 377.

Trouble with the steering gear is a difficulty feared by every motorist as it leaves him helpless and, even though the automobile is traveling at a moderate speed, is likely to cause serious injury to the occupant of the automobile, to say nothing of those on the road. The Law Applied to Motor Vehicles, Babbitt, Sec. 226.

In order to give some protection to persons using the public highways, safety appliances on motor vehicles are required by statute in nearly all of the states. Apart from any statute, the law requires care in all things pertaining to the efficiency of the engine and equipment, and the means by which both may be controlled. Babbitt, supra, Sec. 229.

The statute of this State, Chapter 86, Gen. Laws, 1909, requires, among other things, that every motor vehicle while in use on the public highways shall be provided with adequate brakes.

In the case of MacPherson v. Buick Motor Co., 217 N. Y. 382, Ann. Cases, 1916C, 440, in a carefully written opinion by CARDOZO, J., the court held that, "The manufacturer of an automobile is liable to a purchaser thereof from a dealer for injuries caused by a defective wheel, the defects in which could have been discovered by reasonable inspection, though the wheel was purchased by the automobile manufacturer from the maker thereof." In discussing the rule relating to the liability of the manufacturer of an article, which by reason of a defect therein, discoverable by reasonable inspection, is a source of peril to the user thereof and renders the manufacturer liable to the ultimate purchaser for an injury resulting from the defect, the court says, "If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger. Its nature gives warning of the consequences to be expected. If to the element of danger there is added knowledge that the thing will be used by persons other than the purchaser, and used without new tests, then, irrespective of contract, the manufacturer of this thing of danger is under a duty to make it carefully."

"Beyond all question, the nature of an automobile gives warning of probable danger if its construction is defective. This automobile was designed to go fifty miles an hour. Unless its wheels were sound and strong, injury was almost certain."

"Precedents drawn from the days of travel by stage coach do not fit the conditions of travel today. The principle that the danger must be imminent does not change, but the things subject to the principle do change. They are whatever the needs of life in a developing civilization require them to be."

The bailor, by the bailment, impliedly warrants that the thing hired is of the character and in a condition to be used as contemplated by the contract, and he is liable for damages occasioned by the faults or defects of the article hired. 7 Am. & Eng. Encyc. of Law, 2nd Ed., 306 bb.

Whenever a garage keeper lets a vehicle for hire to a customer, it becomes his duty to exercise that degree of care and skill in the selection of the vehicle he sends out which a prudent man, having regard of the circumstances or the occasion, would bestow upon such a matter. Babbitt, supra, Sec. 522.

It has been held that he is liable to the hirer of an automobile for injuries which happen by reason of defects in the automobile which might have been discovered by a most careful and thorough examination. Denver O. & C. Co. v. Madigan, 21 Col. App. 131.

The right to use the highways must be exercised so as not to endanger the lives or property of others who have equal rights upon them. *Bennett* v. *Lovell*, 12 R. I. 166.

Automobiles are in constant use upon the public highways and a garage keeper, who lets automobiles for hire, owes a duty to the public to the extent that he is bound to use ordinary care to see that the automobile he lets to be operated upon the public highways has its steering gear in a reasonably safe condition, as injuries to other persons lawfully using the highways is reasonably to be foreseen as the probable result of a defective steering gear.

If the defendant operated his own automobile with a defective steering gear upon the public highway when he knew, or, in the exercise of reasonable care, should have known of such defect, and a third person was injured as the direct and proximate result of said defect, he would be liable to such third person; and it would be anomalous to hold that, because he let said defective automobile to a bailee for hire for use upon the public highway and while it was being so used, such third person was injured as the direct and proximate result of said defect, he would not be liable.

The defect alleged in the declaration is not in the construction of the radius rod but negligence in permitting some bolts to be loose which ordinarily made it secure, thereby rendering the automobile ungovernable while being driven upon the public highway. On demurrer these allegations are taken to be true and for damage resulting therefrom the bailor should be held responsible, subject to the rules relating to proximate cause and contributory negligence.

The plaintiff's exception is sustained, the demurrer is overruled, and the case is remitted to the Superior Court for further proceedings.

William A. Gunning, for plaintiff.

Cushing, Carroll & McCartin, for defendant.

Joslin Manufacturing Co. vs. Walter L. Clarke, City Treas., et al.

SCITUATE LIGHT & POWER Co. vs. WALTER L. CLARKE, City Treas., et al.

THERESA B. JOSLIN vs. WALTER L. CLARKE, City Treas. et al.

JULY 6, 1921.

PRESENT: Sweetland, C. J., Vincent, Stearns, Rathbun, and Sweeney, JJ.

(1) Constitutional Law.

Pub. Laws, cap. 1278, "An act to furnish the City of Providence with a Supply of Pure Water." is not obnoxious to Cons. U. S. Articles V and XIV of amendments.

(2) Constitutional Law.

The first ten amendments to the federal constitution are restrictions on the powers of the federal government and not upon the powers of the State governments.

BILL IN EQUITY. Certified on constitutional question, under Gen. Laws, cap. 298, § 1.

Stearns, J. The proceeding in each of these causes is by a bill in equity, which was brought in the Superior Court to restrain the City of Providence, its agents and servants, from taking possession of or interfering with the property of the complainants. The constitutionality of an act of the General Assembly having been brought in question by the pleadings and upon the record, the three causes were then certified to this court for the determination of the constitutional questions, in accordance with the provision of Chapter 298, Sec. 1, Gen. Laws.

The statute in question is Chapter 1278 of the Public Laws, which is entitled, "An Act to furnish the City of Providence with a Supply of Pure Water." The claim is that the statute is unconstitutional in that it violates the provisions of Articles V and XIV of the Amendments of the Constitution of the United States.

In Joslin Mfg. Co. v. Clarke, 41 R. I. 350, decided in 1918, in proceedings between the same parties and upon the same statement of facts as in the present proceedings, we held that said Chapter 1278 was not unconstitutional and was not in conflict with the provisions of Sections 5 or 10 of Article I of the Constitution of Rhode Island or with the provisions of Article XIV of the Amendments of the Constitution of the United States.

In the present proceedings it is not now claimed that the act is in violation of any provision of the State constitution, but the claim is that the act is in violation of Article V and Article XIV of the Amendments of the federal constitution. The only new question thus raised is, Is the act in violation of the provisions of Article V of the Amendments of the Constitution of the United States? The first ten amendments to the federal constitution are restrictions on the powers of the federal government and not upon the powers of the State governments. State v. Paul, 5 R. I. 185 (1858); State v. Keeran, 5 R. I. 497; State v. Flynn, 16 R. I. 10; In re Liquors of Fitzpatrick, 16 R. I. 60; State v. Brown & Sharpe Mfg. Co., 18 R. I. 16; Shaw v. Silverstein, 21 R. I.

500; Opinion to the Governor, 21 R. I. 582; State v. Armeno, 29 R. I. 431; East Shore Land Co. v. Peckham et al., 33 R. I. 541; Barron v. The Mayor & City Council of Baltimore. 7 Peters, 243 (1833). In U. S. v. Cruikshank et al., 92 U. S. 542 (1875), Chief Justice Waite, speaking of the first ten amendments, said that they were not intended to limit the powers of the State governments in respect to their own citizens but to operate upon the national government alone and after citing authorities continued as follows: "It is now too late to question the correctness of this construction. As was said by the late Chief Justice, in Twitchell v. the Commonwealth, 7 Wall. 325, 'the scope and application of these amendments are no longer subjects of discussion here.'" See also Spies v. Illinois, 123 U.S. 131; Brown v. New Jersey, 175 U.S. 172; Twining v. New Jersey, 211 U. S. 78, and cases cited therein.

Our decision is that said Chapter 1278 is not in violation of either Article V or Article XIV of the Amendments of the Constitution of the United States.

The papers in these causes with our decision certified thereon are ordered to be sent back to the Superior Court for further proceedings.

Robert H. McCarter, Francis I. McCanna, Alfred G. Chaffee, for complainants. James Harris, of counsel.

Elmer S. Chace, City Solicitor, Albert A. Baker, for respondent.

CHARLES W. WHITMAN et al. vs CITY OF PROVIDENCE.

JULY 6, 1921.

PRESENT: Sweetland, C. J., Vincent, Stearns, Rathbun, and Sweeney, JJ.

(1) Condemnation Proceedings. Evidence. Use and Occupation.

Under Pub. Laws, cap. 1278, "An act to furnish the City of Providence with a supply of pure water," upon petition for assessment of petitioner's damages caused by the taking of his property in condemnation proceedings, as petitioner is entitled to compensation as of the date the city acquired title

and was empowered to take possession, he should receive interest upon the amount of such compensation, until it is paid, not as a part of his damages but to indemnify him for the detention of the money after it became due but evidence in regard to the right of the city to demand payment for the use and occupation of the property by petitioner after the taking of title by the city is inadmissible as outside the only issue involved in the proceedings.

Petition for assessment of damages in condemnation proceedings under Pub. Laws, cap. 1278. Heard on exceptions of respondent and sustained.

SWEETLAND, C. J. This is a petition for the assessment by a jury of the petitioners' damages caused by the taking of their farm in Scituate in condemnation proceedings under the provisions of Chapter 1278 of the Public Laws, 1915, entitled "An Act to furnish the City of Providence with a supply of pure water."

The petition was heard before a justice of the Superior Court sitting with a jury. The jury by its verdict assessed the petitioners' damages at \$4,792.50. The respondent duly filed a motion for new trial which was denied by the justice. The case is before us upon the respondent's exception to the decision of said justice on the motion for new trial and upon its exception to an instruction given to the jury by said justice.

In accordance with the provisions of said act the city of Providence acquired title to the farm in question and was empowered to take possession of the same on December 6, 1917. The petitioners were then entitled to receive compensation therefore as of that date. In accordance with the rule laid down by the court In Re Southern New England Railway Co. for Condemnation of Certain Land, 38 R. I. 216, said justice ruled that the petitioners were also entitled to receive interest upon the amount of their damages from that date to the time of trial.

On December 6, 1917, when title to the farm passed to the city of Providence the city did not take possession, and without agreement between the parties the petitioners

remained in possession. The petitioners also continued to receive from a person who occupied a small house on said farm the same sum which they had formerly collected from that person as rent for said house. The respondent excepted to the charge of said justice to the jury directing them, in computing the amount of their verdict, to disregard the sum received by the petitioners from the occupants of the small house after December 6, 1917.

The respondent urges that if the petitioners are permitted to recover interest on their damages after December 6, (1) 1917, the city should be permitted to offset against such interest the value of the use of said farm by the petitioners after that date including any money which they may have received from others for the occupancy of any portion of it. This proceeding, provided for in the act, is solely for the purpose of ascertaining the amount of compensation which the petitioners should receive for the taking of their farm on December 6, 1917. They are entitled to compensation as of that date and should receive interest upon the amount of such compensation until it is paid, not as a part of their damages for the taking but to indemnify them for the detention of a sum of money after the time when in law it was justly due. Because of the relation of the interest to the matter in issue it was properly allowed to the petitioners in this proceeding. On December 6, 1917, title to the farm passed to the city and the right to possession was solely in it. After that date, the right of the city to demand payment for use and occupation of said farm or any portion of it by the petitioners or any other person, and the just amount of such payment were matters entirely outside the sole issue which arose in the trial of this petition. The interjection of these matters would tend to confuse the real issue and in the absence of statutory provision permitting their consideration, they should have been excluded.

From the written decision of the justice upon the motion for new trial we are in some doubt as to his position regarding the justness of the verdict. We think it can fairly be

gathered from his language that he regarded the amount of the verdict as excessive, but was unwilling to disturb it because of his inability to fix a remittitur which was satisfactory to him. We have examined the testimony and it appears to us that the verdict is clearly excessive. testimony as to the value of the farm was conflicting: the estimates of the witnesses differed widely. In seeking to fix upon a sum which shall give fair compensation to the petitioners we meet the same difficulties which confronted the justice of the Superior Court. The matter does not permit of an answer which shall be entirely satisfactory to us. We have commented upon the nature of this difficulty in Marsella v. Simonelli, 43 R. I. 153. The statute however places upon us, as it does upon the Superior Court. the duty of stating what portion of a verdict we deem to be excessive. The six expert witnesses who testified for the respondent appear to us to have a much greater general experience in regard to real estate values, and a more intimate knowledge of the market value of farms in the vicinity of the one in question than the six witnesses presented by the petitioners. The witnesses for the respondent gave their testimony without apparent bias. Each of their estimates is much lower than the verdict of the jury. No two are exactly alike yet they are sufficiently in accord to give us confidence in the approximate justness of their conclusions. We have fixed upon \$2,400 as the sum which without doubt will amply compensate the petitioners. This sum agrees with the highest estimate given by any of the respondent's witnesses. In thus fixing compensation for the involuntary relinquishment of the petitioners' home we are fully satisfied from the testimony that no unjustness has been done to The sum of \$2,400 with interest from December 6. 1917, to the day of trial amounts to \$2,760.

The respondent's exception to the charge of said justice is overruled. Its exception to the decision of said justice on the motion for new trial is sustained. The case is remitted to the Superior Court for a new trial unless on or before



July 18, 1921, the petitioners shall by a remittitur filed in the clerk's office of the Superior Court remit all of said verdict in excess of \$2,760, in which latter case the Superior Court is directed to enter judgment for the petitioners in the sum of \$2,760.

Frank L. Hanley, for petitioner.

Elmer S. Chace, City Solicitor, Oscar L. Heltzen, Assistant City Solicitor, for respondent.

JAMES A. MONCRIEF vs EDWIN I. PALMER et al.

JULY 6, 1921.

PRESENT: Sweetland, C. J., Vincent, Stearns, Rathbun, and Sweeney, JJ.

(1) Usury: Equity.

Notwithstanding the drastic provisions of the statute in regard to usury, cap. 434, Pub. Laws, 1909, as amended by Pub. Laws cap. 838, 1912, the borrower under a usurious contract before he can be given the relief of cancellation of the contract, must perform the moral obligation resting upon him and pay or offer to pay the principal of the loan with legal interest.

(2) Equity. Usury.

Equity will enforce the usury law against the lender, and also for the protection of the borrower, in so far as such enforcement does not lead it to disregard those equitable principles, which as a court of conscience it must enjoin upon all suitors before it.

(3) Usury. Equity.

Although in law a mortgage executed by the borrower is of no effect as security for the usurious contract, in a suit by the borrower, equity will treat the mortgage as a valid security for the amount which it regards as justly due from the borrower to the lender.

(4) Usury. Rate of Interest. Equity.

Where it appears that a lender has violated the usury statute which fixes 30% as the highest rate that may be charged for interest on sums over \$50, no consideration of conscience would require a court of equity to hold that the borrower seeking relief, ought to pay more upon the loan than six per cent, the rate fixed by law in the absence of express stipulation.

(5) Usury. Equity.

Where it appeared upon bill in equity seeking relief from a usurious contract, that complainant had made payments largely in excess of legal interest upon the loan, the court should direct such application of the excess to be made as appears most beneficial to complainant. It was error to dismiss the bill on demurrer on the ground that it neither showed payment or made tender of payment, but the bill should have been held for hearing on its prayer to restrain a threatened sale, and if upon hearing the allegations of usury were sustained the court should direct the application of the payments in excess of legal interest, as should be for the protection of complainant, and give such conditional relief as might be required under the rules of equity in the circumstances of the case.

BILL IN EQUITY on facts fully stated in opinion. Heard on appeal of complainant and sustained.

SWEETLAND, C. J. This is a bill in equity praying that a certain note made by the complainant to the respondent Palmer for money loaned be declared usurious and void and be surrendered to the complainant; that a certain mortgage deed of personal property given by the complainant to said Palmer as security for the payment of said note be cancelled; and that the respondent Palmer be restrained from alienating said mortgage and note, and from foreclosing said mortgage.

The complainant in his bill makes no offer to pay to the respondent Palmer the money loaned with legal interest. On demurrer a justice of the Superior Court held that under the allegations of the bill the transaction was usurious but dismissed the bill on the ground that payment or a tender of payment constituted a condition precedent to the granting of the equitable relief sought. The cause is before us upon the complainant's appeal from the decree of the Superior Court.

The provisions of the Rhode Island statute with reference to usury are drastic. Chapter 434, Public Laws, 1909, amended by Chapter 838, Public Laws, 1912. The violation of the act is punishable as a misdemeanor, every contract made in violation of it is void and the borrower may recover in an action at law not only the interest but any portion of the principal paid by him upon such usurious contract. The complainant's solicitor has presented to us a very comprehensive and able argument in support of his

contention that equity should recognize the view of public policy emphatically expressed in the legislative act and should cancel the usurious and void contract. This argument would have more persuasive force if the question were a new one. The settled and nearly universal practice of courts of equity is opposed to the complainant's contention. The statutes of different states have various provisions directed towards the prevention of the extortion and oppression of usury. Whatever may be the method adopted by the legislature however, although the legislative provision may go to the limit of our statute and declare the contract void and unenforceable, nevertheless courts of equity in the absence of statute, specifically constraining them to act differently, have insisted upon the equitable principle that he "who seeks equity must do equity" and have required the borrower, before he can be given the relief of cancellation of the contract to perform the moral obligation resting upon him and pay or offer to pay the principal of the loan with legal interest.

The opinion of Mr. Justice Shiras in Missouri v. Krumseig. 172 U.S. 351, upon which the complainant places much reliance, is based upon the construction given to a Minnesota usury statute by the Supreme Court of that state. statute provides that the courts may enjoin any proceeding upon an instrument given in violation of the statute and order the same cancelled and given up. The Supreme Court of Minnesota found in other provisions of the statute the legislative intent that such injunction and order should be made although the borrower did not offer to pay the debt with legal interest. Complainant's counsel finds some support for his argument in the opinion of the court in the early Massachusetts case of Hart v. Goldsmith, 1 Allen, 145. in which a borrower who brought a bill to redeem mortgaged premises was held to be entitled to the benefit of the statutory penalty for usury in reduction of the sum payable upon the mortgage. This has been followed in later Massachusetts cases. The court in that case appears

to have been affected to some extent by the provision of the Massachusetts usury statute providing that the borrower might recover the penalty for usury by a bill in chancery. We do not think it can be said fairly that in *Hart* v. *Goldsmith*, *supra*, the Massachusetts court intended to create an exception to the ordinary rule. We are of the opinion that we should conform to the generally accepted equitable principle. 1 Story. Eq. Jur. 14th Ed. § 424.

The complainant further contends that if under the allegations of his bill a court of equity can not properly grant him the relief of cancellation of said note and mortgage, nevertheless under said allegations the bill should not have been dismissed, but should have been retained by the court for the purpose of restraining the threatened foreclosure of the mortgage. By "foreclosure" the complainant intends the exercise by the respondent Palmer of the power of sale contained in said mortgage. plainant bases this contention upon his claim that it appears by the bill that the sum of usurious interest paid by the complainant before the filing of the bill amounts to six per cent on the principal of the loan from the time when said loan was made up to a time about four years after the beginning this suit, or until June, 1923. The position of the complainant in that regard is that equity should restrain the threatened sale under the power because the complainant is not in default.

The General Assembly has declared that it is against public policy to permit the taking of interest at a rate in excess of that which it has prescribed. Under the statute, on all sums loaned exceeding fifty dollars the borrower is permitted to reserve, charge or take, by contract, interest not exceeding thirty per cent per annum. The taking of interest at a greater rate either directly or indirectly is prohibited, and every contract made in violation of the statute is declared usurious and void. In equity as well as in law the Superior Court will not aid a lender in the enforcement of such an usurious contract, nor should it require

a borrower to perform such contract as the condition of granting him equitable relief. As a court of equity it will enforce the usury law, established by the General Assembly, against the lender, and also for the protection of the borrower. in so far as such enforcement does not lead it to disregard those equitable principles, which as a court of conscience it must enjoin upon all suitors before it. When in equity the borrower, seeking relief from an usurious contract, is the actor before it, the Superior Court should insist upon the recognition by such borrower of his moral obligation to return the money loaned at the time when in good conscience it is due with legal interest. Although in law the mortgage is of no effect as security for the usurious contract, in a suit by the borrower, equity will treat the mortgage as a valid security for the amount that it regards as justly due from the borrower to the lender.

Upon the complainant's contention, which we are now considering, it is necessary to determine what, in the circumstances of this case, equity ought to regard as legal interest upon the loan from Palmer to the complainant. Is it six per cent., or is it thirty per cent., the highest rate allowable by law within the usurious rate taken by the respondent in the transaction? It should be borne in mind that the insistence of equity, that notwithstanding the statute there still exists a moral obligation resting upon the borrower, does not proceed from any regard for the lender, and is not for the purpose of giving life to a contract which the General Assembly has declared to be void, but arises (3) from the equitable consideration that it is contrary to good conscience that a complainant should be freed from liability and still be permitted to retain the money of the lender and be required to make no proper compensation for its use. contract for illegal interest is as void in equity as it is in law, and furnishes no standard for measuring the borrower's moral duty to pay interest. Under the allegations of the bill the Superior Court was warranted in holding that the lender Palmer had indirectly taken interest on the loan made to the complainant at a rate exceeding thirty per cent per annum. No consideration of conscience would require that court to hold that the rate of interest which the complainant ought to pay upon that loan was more than six per cent, the rate fixed by law in the absence of express stipulation.

(4) The question next arises shall the complainant in an accounting or in a proceeding to determine whether or not he is in default be permitted to have credit at the rate of six per cent for the payments which he has made as interest upon the void note, which payments have been credited by the lender in accordance with the terms of the illegal contract? Some courts of law have held that one who voluntarily pays unlawful interest upon an usurious contract cannot recover it by suit in the absence of a permissive statute; and some equity courts in stating an account between the parties or in a proceeding to redeem mortgaged premises will not allow the borrower credit at the legal rate for such voluntary payments. We regard the contrary as the sounder position and as one constituting a salutary protection to the victims of usury, which position a court, without violating equitable principles, may well take in conformity with the policy of the statute law. Parmelee v. Lawrence, 44 Ill. 405; Norvell v. Hedrick, 21 The Massachusetts court in Hart v. Goldsmith, W. Va. 523. 1 Allen, 145, and the cases following it have gone farther, and, in an equitable suit to redeem premises mortgaged to secure an usurious loan, have permitted the borrower to have credit for the amount of the statutory penalty for usury, such penalty being three times the usurious interest reserved.

From the bill it appears that the complainant has made payments largely in excess of legal interest on the loan. There has been no application of this excess which the court should recognize, but the court should direct such application to be made as appears most beneficial to the complainant. Ordinarily it would be for the benefit of a

borrower that such excess should be applied in reduction of the principal of the loan. The complainant is asking that it shall be applied to the payment of interest in advance on said loan so that he may not be in default. In view of the terms of sale contained in the mortgage, a copy of which is annexed to the bill, it appears desirable that the complainant should be protected against a sale which may be had without actual notice to him.

In our opinion the bill should not have been dismissed upon demurrer, but should have been held for hearing upon the complainant's prayer for the restraint of the threatened sale under the power contained in the mortgage. If upon hearing the complainant sustains his allegation of usury and it appears that payments in excess of legal interest have been made by the complainant upon said loan, then the Superior Court should direct the application of such payments to be made as shall be for the protection of the complainant; and the court should make such declaratory decree and should give to the complainant such conditional relief as equity may require in the circumstances of the case.

The complainant's appeal is sustained. The decree of the Superior Court, dismissing the bill, is reversed. The cause is remanded to the Superior Court for further proceedings in accordance with this opinion.

Clarence W. Woolley, for complainant. Frank L. Hanley, for respondent.

J. E. Nichols vs. Henry W. Mason & Co.

OCTOBER 26, 1921.

PRESENT: Sweetland, C. J., Vincent, Stearns, Rathbun, and Sweeney, J. J.

(1) Exceptions. Stating Exceptions.

Under Gen. Laws, cap. 298, sec. 17, providing that in a bill of exceptions the moving party "shall state separately and clearly the exceptions relied upon" the statement of an exception requires no reference to the validity of the exception but should be merely an allegation of the fact that it was duly taken.

- (2) Exceptions. Stating Exceptions.
- The reasons for claiming error in the ruling of the court, are not properly included in the statement of an exception.
- (3) Exceptions. Stating Exceptions.
- Exceptions which do not set out the ruling of the court, either in terms or by reference, but merely state the claim of the moving party as to the effect of the ruling of the court, will not be allowed.
- (4) Exceptions. Altering Exceptions.
- As a justice of the Superior Court upon consideration of a bill of exceptions has authority to disallow or alter the bill, the Supreme Court on consideration of a petition to establish the truth of exceptions has the same power, and will alter the statement of exceptions contained in the petition to conform to the facts as shown in the transcript.

Petitions to establish truth of exceptions. The facts are fully set forth in the opinion.

SWEETLAND, C. J. The above entitled cause is before the court upon the petition of the plaintiff to establish the truth of his exceptions and the correctness of the transcript filed by him and also upon the petition of the defendant to establish the truth of his exceptions and the correctness of the transcript filed by him.

The case was tried before a justice of the Superior Court sitting with a jury and resulted in a verdict for the plaintiff. Said justice granted the defendant's motion for new trial. The plaintiff and the defendant each duly filed a bill of exceptions and a transcript of the evidence. By reason of the death of said justice he did not act upon said bills of exceptions. In accordance with the statutory provision applicable to this case the plaintiff and defendant have each filed in this court a petition to establish the truth of his exceptions and the correctness of the transcript of evidence filed by him.

The defendant has sought to correct these transcripts furnished to the parties by the Superior Court stenographer by pointing out in an affidavit their inaccuracy, in certain minor particulars. The plaintiff does not question the defendant's claim in this regard and it appears to us to be valid. Said transcripts are amended by inserting in each transcript the words "direct him" after the word "arbitration" in cross question 802 on page 144, by substituting the word "plaintiff" for the word "defendant" in the statement of Mr. Greenlaw on page 991, by substituting the word "like" for the word "right" in question 22 on page 1007, and the transcript filed by the defendant is further amended by substituting the word "Beagan" for the word "Greenlaw" at about the middle of page 337. As thus amended the correctness of each of said transcripts is established.

The plaintiff does not question the truth of the exceptions which the defendant seeks to establish by his petition. By reference to the transcripts said exceptions of the defendant appear to have been duly taken by him, and their truth is hereby established.

The defendant objects to the statement of exceptions contained in the plaintiff's petition and urges that said alleged exceptions of the plaintiff should not be established as true. The transcripts of evidence, the correctness of which we have established, disclose that with reference to each exception stated by the plaintiff in his petition, except the forty-fifth, he did take an exception to a ruling of said justice at that point in the course of the trial to which he now refers and as he has alleged in his petition. In most instances, however, the plaintiff has not correctly stated the rulings of said justice to which the exceptions were taken.

The statute provides (Chapter 298, Section 17, Gen. Laws, 1909) that in a bill of exceptions the moving party "shall state separately and clearly the exceptions relied upon." We have frequently held that the statement of an exception under this provision of the statute requires no reference to the validity of the exception, but should be merely an allegation of its truth, i. e., the fact that it was duly taken. We have pointed out in Blake v. Atlantic National Bank, 33 R. I. 109, and Dunn Worsted Mills v. Allendale Mills, 33 R. I. 115, and have held in many subse-

quent unreported cases, that a bill of exceptions is a formal enumeration of the exceptions upon which the moving party relies; and that an exception is properly stated by setting out the ruling of the Superior Court and the fact that an exception to said ruling was duly taken. If the exception be to the ruling of a justice of the Superior Court made in the course of a trial the exception may be stated by making an exact reference to the ruling as it appears in the transcript, and by alleging that an exception was duly taken to such ruling, with a reference to the place in the transcript where it appears that the exception was noted. These suggestions as to the proper method of stating an exception apply equally to a statement contained in a bill presented for allowance to a justice of the Superior Court, and to an allegation made in a petition to establish the truth of exceptions presented to this court.

In the statement of some of the exceptions upon which he now relies the plaintiff has so nearly observed our rule that we shall establish the truth of such exceptions. example is the statement of the plaintiff's thirty-sixth exception, as follows: "Thirty sixth, To the Court's ruling excluding the question as to whether any credit went to Mr. Nichols for the 155 bales that were sold at an advance of a cent and a half a pound, exception thereto being noted at page 660 of said transcript;" By reference to the transcript it appears that this exception was taken to the ruling of the justice excluding the following question: "1067 C. Q. And these 55 that came back were sold as we have traced out. Now what I want to ask you is this, does this account here show any credit to Mr. Nichols for the 155 bales that were sold at an advance of a cent and a half a pound?" We think, however, that this exception would have been more exactly and conveniently stated in some such manner as the following. "Thirty sixth, To the Court's ruling excluding cross question 1067 appearing on page 659 of the transcript, the exception to said ruling appearing on page 660 of the transcript." The plaintiff has stated the following exceptions with such a degree of exactness that we should not be justified in disallowing them and we shall regard their truth as established. They are the sixth, eighth, ninth, eleventh, twelfth, twenty-third, twenty-fourth, twenty-fifth, twenty-seventh, thirty-first, thirty-sixth, forty-second, forty-third, and forty-fourth. The truth of the forty-seventh is established after striking out its second and third paragraphs which set forth the plaintiff's reasons for claiming error in the ruling of said justice. Such reasons are not properly included in the statement of

2) Such reasons are not properly included in the statement of an exception. Dunn Worsted Mills v. Allendale Mills, 33 R. I. 115.

The plaintiff's statements of his alleged seventh, tenth, thirtieth, and forty-sixth exceptions are repugnant to the statutory requirement that exceptions should be stated separately.

By reference to the transcript it appears that the plaintiff did not take the exception which he states as his forty-fifth exception. The question involved in the plaintiff's alleged forty-fifth exception seems, upon superficial examination, to have been brought here by the plaintiff's exceptions to the refusal of said justice to instruct the jury in accordance with the plaintiff's requests to charge, numbered twenty-eight to thirty-five inclusive.

In the statement of each of his exceptions, other than those referred to above, the plaintiff does not set out the ruling of said justice, either in terms or by reference, but apparently intends to state what he claims was the effect of a certain ruling made by the justice. An example of this manner of stating his exceptions appears in what the plaintiff alleges as his fifteenth exception, which is as follows: "Fifteenth, To the Court's ruling permitting the defendant through the witness Marlor to give in evidence that the arbitration board found the types FINE and KIM as equal, objection to which is taken at pages 360 and 361 and exception thereto being noted on page 361 of said transcript." On page 361 of the transcript is the notation of the plain-

tiff's exception to the ruling of the justice permitting the defendant to propound his 429th question to the witness Marlor. The question is as follows: "429 Q. Exhibits 17 and 18 and ask you whether or not the original record shows that the types that were submitted were found equal in staple." In the statement of this exception in his petition the plaintiff may or may not have set out correctly the effect of this ruling of the justice, but he clearly has not stated the ruling. To determine whether the plaintiff's claim as to the effect of the ruling is justified would require an examination, perhaps an extensive examination, of the other evidence in the case and possibly it could not be fairly determined without listening to the argument of adversary counsel. Such examination and argument is out of place at a hearing upon the allowance of a bill of exceptions or on a petition to establish the truth of exceptions. There the courts are concerned with the question of whether or not exceptions have been taken to specific rulings of the Superior Court shown upon the record, and not at all with the effect of such rulings. In his argument upon the validity of his exceptions the plaintiff will be permitted to take advantage of any claim which he may desire to make as to the result or effect of any ruling of the Superior Court, the truth of his exception to which has been established. When a party prosecuting exceptions sets out in the bill his claim as to the effect of a ruling of the Superior Court he has exceeded a statement of the truth of the exception, and has introduced matter which is only pertinent in an examination as to the validity of the exception.

The plaintiff's exceptions, as stated in his petition, other

(4) than those which we have said may be established as true, are not approved.

A justice of the Superior Court upon consideration of a bill of exceptions submitted for his approval has authority to disallow or alter said bill. (Chapter 298, Section 21, Gen. Laws, 1909.) The same power is in us in the consideration of the plaintiff's petition and we will alter the state-

ment of exceptions contained in said petition to conform to the facts as shown in the transcript.

The plaintiff may submit to us, after notice to the defendant, a statement of his exceptions drawn in conformity with this opinion. For convenience of reference in the future progress of the cause the plaintiff should include in said statement all of his exceptions set down in order, those which we have allowed as stated in the petition and those which we have been unable to approve.

John P. Beagan, for plaintiff.

Waterman & Greenlaw. Charles E. Tilley, for defendant.

Francesco Librandi vs. Anastatia P. O'Keefe.

NOVEMBER 18, 1921.

PRESENT: Sweetland, C. J., Vincent, Stearns, Rathbun, and Sweeney, JJ.

(1) Pleading. Joinder of Counts. Amendment.

It was not error under Gen. Laws, 1909, cap. 283, sec. 26, to permit a plaintiff where the writ and declaration were in assumpsit, the declaration alleging a breach of a lease containing covenants, to file additional counts in covenant after the completion of the testimony, the purpose of the statute being to save litigants from the disadvantage arising from mistaken forms of action, and the matter of the amendment also being in the discretion of the trial court.

(2) Mortgages. Leases.

A mortgage of personal property contained a provision "upon default of any of the terms of the mortgage, this instrument shall operate as a transfer of any lease or tenancy that he (the mortgagor) may have in said premises at such time." The mortgagor was a tenant under a lease containing a covenant against subletting or assigning the whole or any part of the premises without the written consent of lessor. The mortgage foreclosed the mortgage and thereafter the lessor executed a lease of the premises to a third party and mortgagor brought his action for breach of covenant for quiet enjoyment. When the mortgage was foreclosed the leasehold interest of the mortgagor was not offered for sale.

Held, that before the transfer of the leasehold interest of the mortgagor could be said to have any effect, it must appear that the mortgagee assumed dominion over the premises, warranting lessor in asserting his right of possession. Assumpsit. Heard on exceptions of both parties. Exception of plaintiff overruled. Exception of defendant to denial of her motion for new trial sustained.

VINCENT, J. This is an action of assumpsit and is now before us upon the exceptions of both the plaintiff and the defendant. On January 3, 1914, the defendant, and her husband since deceased, leased to the plaintiff a certain store located on the corner of Broadway and Knight street in the city of Providence. This lease according to its terms was to run for ten years.

The plaintiff covenanted not to sublet or assign the whole or any part of said premises without the written consent of the lessors. The plaintiff entered into possession of the premises and continued in uninterrupted enjoyment thereof until January 28, 1918, when a fire occurred.

On July 10, 1914, the plaintiff executed a mortgage on the stock and fixtures in the store to one Salvatore Chiappinelli, which mortgage was duly recorded on the same day. By the terms of this mortgage the plaintiff also covenanted and agreed that in case of any default such default would operate to terminate the mortgagor's tenancy in the premises and would constitute an assignment of the lease of the premises to the mortgagee. The plaintiff further covenanted in said mortgage that he would keep insurance upon the mortgaged property payable in case of loss to the mortgagee as his interest might appear.

On March 9, 1918, the mortgagee foreclosed the mortgage. On April 16, 1918, the defendant executed a lease of the premises to one Arduino Sormanti which said lease was to run from March 9, 1918, the date of the foreclosure.

On April 16, 1918, the plaintiff brought his present action in assumpsit against the defendant. The plaintiff's declaration showed that the action was based upon a lease containing covenants and at the conclusion of the plaintiff's testimony the defendant moved for a nonsuit on the ground that the action should have been in covenant and not in

assumpsit, which motion was denied by the trial court. Subsequently, upon the conclusion of all the testimony, the plaintiff was permitted to file two additional counts in covenant.

The jury returned a verdict for the plaintiff in the sum of \$4,700.

The defendant filed her motion for a new trial and after hearing thereon the trial court found the verdict to be clearly excessive and granted a new trial unless the plaintiff should within ten days remit all in excess of \$1,160. The plaintiff did not file a remittitur but took an exception to the decision of the trial court which is the only exception of the plaintiff before us.

The defendant has filed twenty-two exceptions of which eighteen are to the admission and exclusion of testimony. The remaining four exceptions cover the denial of a motion to direct a verdict; the decision of the court allowing the plaintiff to file additional counts in covenant; the refusal to charge as requested; and the denial of the motion for a new trial.

(1) The defendant contends that the trial court erred in permitting the plaintiff to file additional counts in covenant after the completion of the testimony, his writ and declaration being in assumpsit and the latter alleging a breach of a lease containing covenants.

It is provided by Section 26, Chapter 283, General Laws 1909, that, "When a plaintiff has reason to doubt whether his action should be in covenant, debt, or assumpsit, he may bring either action and may join therein counts in covenant, debt, and assumpsit, or any of them, and when he has reason to doubt whether the action should be trespass or trespass on the case, he may bring either action and join therein counts in trespass and trespass on the case, or either of them, and the defendant in all such cases shall plead to the several counts according to the practice at common law, and judgment may be entered upon the counts under which the plaintiff may be entitled to recover."

There can be no doubt that under this provision of the statute the plaintiff could have joined counts in assumpsit and covenant in his original declaration, being in doubt which form of action he should bring, and that a judgment could properly be entered upon the counts under which it might appear he was entitled to recover. Adams v. Lorraine Mfg. Co., 29 R. I. 333; Sowter v. Seekonk Lace Co., 34 R. I. 304.

The defendant argues that the sole claim of the plaintiff being upon an alleged breech of covenant for quiet enjoyment he could not be in doubt as to the proper form of action and therefore, inferentially, that the section of the statute above quoted would not apply.

In Sowter v. Seekonk Lace Co., supra., this question has been fully covered, the court saying, "There is no provision in the statute that the doubt in the plaintiff's mind, which induces him to avail himself of the statute in question, shall be a doubt which appears to the defendant to be a reasonable one. Neither the statute nor this court in its consideration of the above cited case under the statute, have required plaintiffs to set out in pleading the nature of their doubt. Unless he shall be compelled to disclose it in his declaration, we know of no proceeding by which a plaintiff can be required to submit the nature of his doubt to the court that the court may pass upon either its existence or its reason-There are not many circumstances in which the intelligent pleader would be in doubt whether his action should be covenant or assumpsit, though such circumstances may be conceived, and the statute contemplates that they may exist. This plaintiff by his action must be held to claim that such circumstances do in fact exist in his case: and, in the matter now under consideration, his conclusion is controlling."

The fact that the counts in covenant were added after the conclusion of the testimony does not seem to us to present any sufficient reason for excluding the plaintiff from the benefit of the statute, the purpose of which is to simplify

matters of pleading and save litigants from the disadvantage arising from mistaken forms of action. Besides we think that the matter of an amendment to the declaration is in the discretion of the trial court.

Very little need be said regarding the mortgage of the (2) plaintiff to Chiappinelli. The validity of this mortgage is not questioned and there is no dispute as to its terms. The mortgagor being in default, the mortgage was duly foreclosed and the stock and fixtures described therein were sold at public auction, the mortgagee, Mr. Chiappinelli, being the purchaser.

About a week later Chiappinelli sold the stock and fixtures purchased at the foreclosure sale to one Sormanti.

On April 16, 1918, the defendant executed a lease of the store to Sormanti which said lease was to run from March 9, 1918, the date of the foreclosure under the mortgage.

The mortgage of the plaintiff to Chiappinelli contained a provision that "the said mortgagor hereby further agrees that upon default of any of the terms of the mortgage that this instrument shall operate as a transfer of any lease or tenancy that he may have in said premises at such time."

The defendant argues that the execution of the mortgage containing the foregoing provision was a breach of the lease and therefore the rights of the plaintiff, as lessee, then terminated.

On the other hand the plaintiff claims that the defendant must be charged with constructive notice of the existing mortgage and its provisions and that having accepted rent subsequent to the recording of the same she waived any default.

We do not think that the execution and recording of the mortgage is of any importance in the case, it being immaterial whether Mrs. O'Keefe had notice of it either actual or constructive. The provision in the mortgage was not, by its terms, operative until the happening of a future event. When the mortgage was foreclosed the leasehold interest of the plaintiff was not offered for sale. Before the transfer

of that interest, by virtue of the aforesaid provision, could be said to have any effect it must appear that the mortgagee by some attitude or act assumed some dominion over the premises. Whether or not the mortgagee, Chiappinelli took possession of the store after the sale under his mortgage and thus indicated his acceptance of the provision transferring to him the leasehold estate, the testimony does not appear to clearly disclose. The privilege of the defendant to assert her right of possession through the making of a new lease to another party has been determined by this court in *Rinfret & Arruda* v. *Morrisey*, 69 Atl. 763, 29 R. I. 223.

We think that some further consideration of the question of possession, to which we have already alluded, is necessary to a proper investigation and disposition of the matter and therefore that the case should be submitted to another jury. In view of this conclusion it seems unnecessary to consider in detail the other exceptions in the case. The exception of the defendant to the ruling of the trial court denying her motion for a new trial is sustained. The other exceptions of the defendant are overruled. The exception of the plaintiff is also overruled and the case is remitted to the Superior Court with direction to give the defendant a new trial.

Cooney & Cooney, for plaintiff.

Comstock & Canning, for defendant. Edward M. Brennan, of counsel.

LEO GLASS vs. STATE BOARD OF PUBLIC ROADS.

NOVEMBER 18, 1921.

PRESENT: Sweetland, C. J., Vincent, Stearns, Rathbun, and Sweeney, JJ.

(1) Automobiles. Licenses. Trial.

As the hearing before the State Board of Public Roads on the revocation of an automobile license, is a judicial hearing, the decision of the Board must be based upon legal evidence of sufficient weight to support the specific charges made.

- (2) Automobiles. Licenses. Revocation. Charges.
- Under the provisions of The Motor Vehicle Act (cap. 1354, Pub. Laws) authorizing the State Board of Public Roads to revoke an automobile license "for any cause it may deem sufficient," the Board has power to act only on the charges made.
- (3) Automobiles. Licenses. Revocation.
- Action of the State Board of Public Roads in revoking license on the ground that licensee was an unfit and improper person to be licensed, having after hearing found him guilty of a single offence of receiving stolen goods, reviewed and held that the evidence was not sufficient to support the finding.
- (4) Automobiles. Licenses. Revocation. Proof. Trial.
- The hearing by the State Board of Public Roads on the revocation of an automobile license, is civil in its nature even though the charge against licensee is the commission of a crime, and the offence may be established by the preponderance of the evidence.
- (5) Automobiles. Licenses. Trial. Proof.
- On an appeal from action of State Board of Public Roads in revoking an automobile license, where the record shows improper and prejudicial testimony, it must clearly appear that after excluding such testimony there was sufficient legal testimony to satisfy the requirement of proof by a fair preponderance of testimony.
- (6) Automobiles. Licenses. Revocation. Grounds.
- The power of the State Board of Public Roads to revoke a license is not restricted to cases where the right of the public to use the highway in safety is involved, but where the holder of a license is charged with an offence of such a nature or committed in such a manner as to show deliberate disregard of the criminal law, although the crime is not directly connected with the operation of an automobile it may properly be held that the wrongdoer is not entitled to hold a license.
- (7) Automobiles. Licenses. Revocation. Grounds.
- Semble; that the State Board of Public Roads is warranted in revoking or refusing a license whenever in good faith and in the exercise of a reasonable discretion they find that the probable use of the automobile by the licensee would be a detriment to the public safety, welfare or morals.

APPEAL from decree of Superior Court reversing order of State Board of Public Roads in revoking automobile license. Appeal dismissed.

STEARNS, J. This cause was heard on the appeal of the State Board of Public Roads from a final decree of the Superior Court, whereby the action of the State Board of

Public Roads in revoking the license of Leo Glass for operating a motor vehicle upon the public highways was overruled.

Glass, who had received a license to operate a motor vehicle from the State Board of Public Roads, was notified to appear before the Board and show cause why his license should not be revoked. The specific charge was that Glass was guilty of receiving certain goods which had been stolen in this State while in transit on an interstate railroad. After a hearing the license of Glass was revoked on the ground that in the opinion of the Board he was an unfit and improper person to be licensed to operate a motor vehicle.

From the transcript of the testimony it appears that at the hearing Glass, who was represented by counsel, entered a plea of not guilty to the charge, that several witnesses were sworn and testified, the examination being conducted by way of examination and cross examination.

It further appears that Glass, who was engaged in the jobbing business on North Main street, in the city of Providence, bought the cotton cloth, etc., not from the thieves, but from certain persons who had bought the property from the thieves. The price paid was less than the market price and this fact, in connection with the knowledge of Glass that the vendors were engaged in the business of selling and buying poultry throughout the State, and not in handling cotton cloth, was sufficient, it was claimed, to give notice to Glass that the transaction was irregular and improper. The stolen goods were delivered to Glass by automobile belonging to the vendors. Glass testified that his suspicions were aroused, that he insisted on having a bill of sale; that payment was made by his check, on the face of which appeared a statement of the goods for which payment was made, which payment by check, by agreement, was not made until after Glass had sold the goods, that some of the goods by Glass's order were delivered directly to reputable dealers by the vendors. After the arrest of Glass he gave the authorities the names of the persons from whom he had bought the goods and as a consequence the vendors were apprehended. After their arrest and at the hearing one of the persons who had sold the goods to Glass made the statement that at the time of the sale to Glass they had told him the goods had been stolen. This was denied by Glass, who claims that the charge thus made was inspired by the desire for revenge.

At the time of the hearing the case against Glass, who had been bound over to await the action of a Federal Grand Jury, was under consideration by that Grand Jury, but no report thereon had been made.

By Section 8 of The Motor Vehicle Act (Chap. 1354, Pub. Laws), it is provided that any person aggrieved by an order of the Board may appeal to the Superior Court by filing a petition and setting forth therein the grounds of appeal; that said petition shall follow the course of equity so far as applicable, and upon hearing the court "may review the evidence presented before the board and may in its discretion affirm or overrule or modify the order of the board." At the hearing in the Superior Court, the transcript of testimony taken before the Board was presented to that court for review, and upon consideration thereof the action of the Board in revoking the license of Glass was overruled.

The first question raised by the appeal is, was the action of the State Board warranted by the evidence in the case? By Section 7 of the act it is provided that "The board may, after a hearing of which at least three days' notice in writing has been given to the licensee, for any cause it may deem sufficient, enter an order suspending or revoking the license of any person to whom a license has been issued," that the license of any person who has been convicted in any court of any violation of Section 17, which relates to the operation of motor vehicles, and Section 18, which establishes "Rules of the Road" for automobile drivers, may be revoked by the Board upon receipt by it of a certified copy of such conviction. Section 22 provides that records of all violations of the act shall be kept by the courts and a certified

copy of the abstract of the record in each case shall be sent by the court within ten days of the time when such case is disposed of. The judge of any court may make such recommendation to the Board as to the suspension or revocation of the license of the defendant as he may deem necessary. In other sections penalties of fine and imprisonment are provided for violations of the act.

It thus appears that after conviction in any court of any (1) violation of Section 17 or Section 18, the Board may revoke a license after the receipt of a certified copy of the record of conviction without any hearing of the accused. other cases the Board must give the licensee an opportunity to be heard before revoking his license. The Board however may properly in certain cases suspend a license without any hearing; for instance by Section 26 the Board is given authority, when death results from an automobile accident, to forthwith suspend the license of the operator of the car, but the license can not be revoked until after an investigation is made or a hearing is held by the Board. Throughout the statute a distinction is made between the right of suspension and of revocation. The hearing provided by the statute is judicial in its nature (Sec. 27). Board may summon witnesses, administer oaths, order the production of books and documents, and take testimony of witnesses who are entitled to receive fees for attendance and travel. A failure of a witness to appear and testify when summoned is made a misdemeanor. As the hearing is a judicial hearing it follows that the decision of the Board must be based on legal evidence of sufficient weight to support the specific charges made. By the terms of the act the Board may in its discretion refuse to grant a license to any applicant, whom for any reasons it considers an improper person. A broad discretion is thus given to the Board which of course must be exercised in a manner reasonable and not arbitrary. But the power to revoke a

(2) license after a hearing is more restricted. The words of the act "for any cause the board may deem sufficient" must be

construed in the light of the other parts of the act. The provision for notice and hearing restricts the power of the Board to act only on the charges made. The Board revoked the license on the ground that Glass was an unfit and improper person to be licensed. The only support for this finding is that the Board found him guilty of a single offence of receiving stolen goods. In our opinion the evidence is not sufficient to support this finding. As the proceding in this case is civil in its nature, even though the charge is the commission of a crime, the offence may be established by the preponderance of the evidence. Nelson v. Pierce, 18 R. I. 539. And it is not necessary to prove the fact beyond a reasonable doubt as in a criminal proceeding.

In weighing the testimony we have taken into considera-

tion the fact that the members of the Board are usually lavmen and not lawvers. Although in the circumstances it is perhaps too much to expect that the established rules of legal procedure should be followed with the exactness required of a court of law, yet it is only fair to the accused that there should be a substantial compliance with the fundamental rules of legal proceedings. The bulk of the testimony in this case was mere hearsay testimony, which, if believed by the Board, was highly prejudicial to Glass. As this testimony was introduced by the Board it undoubtedly was relied upon by them in reaching a decision. Although there was some other evidence, yet where as in this case, improper and prejudicial testimony is found in the record it must clearly appear that after excluding such testimony there is sufficient legal testimony to satisfy the requirement of proof by a fair preponderance of testimony.

The trial justice held that the Board had power to revoke or to refuse to grant a license only in cases where the right of the public to use the highway in safety was involved; that as the licensee in this case was not accused of any (6) offence which was accomplished by the use of the automobile or which was a result of such use, the action of the Board was unwarranted by the statute. We do not think

that the power of the Board is thus limited. The intent of the act is to secure the safety of the public in the use of the public highways, and also, we think, to protect the public by preventing the use of the automobile for purposes and in ways that are injurious to the community. the automobile today by the criminal class is a menace to the community. By its use the commission of crime is made easier and the apprehension of the criminal more difficult. It is conceded that if the automobile is used in the commission of crime the license of the operator may properly be revoked. But we do not think it was the intention of the legislature to compel the Board to refrain from action until the licensee had actually made use of his automobile in the commission of crime. By Section 13, Chapter 345 Gen. Laws, it is provided that the receiver of stolen goods shall be deemed guilty of larceny. In other words, he is considered a thief and is punished as such. We think that a thief should not be permitted to operate an automobile for as long as his character remains unchanged, the danger of his making unlawful use of the automobile is such that the privilege should be denied to him. By the act a wide discretion is given to the Board, both in the granting and the revocation of licenses. But the exercise of the discretion must be reasonable and is subject to review by the courts. Proof of the commission of any crime, regardless of its nature, however is not in every case sufficient to disqualify a person from holding a driver's license. violations of law are made crimes regardless of the intent of the wrong doer. To refuse to grant or to revoke a license because of the commission of such an offence we think would be unreasonable and unwarranted. When, however, the offence is of such a nature, or committed in such a manner, as to show a deliberate disregard of the criminal law, even although the crime is not directly connected with the operation of an automobile, it may properly be held that the wrongdoer is not entitled to hold a license.

Without attempting in advance to establish a rule which will govern all possible cases, we think the Board is warranted in revoking or refusing to grant a license whenever in good faith and in the exercise of a reasonable discretion they find that the probable use of the automobile by the licensee would be a detriment to the public safety, welfare or morals.

Our conclusion is that if proper proof of the offence of receiving stolen goods is made the Board in its discretion may revoke the license of Glass. The proof is insufficient in this case.

The appeal of the respondent is dismissed, the decree of the Superior Court is affirmed and the cause is remanded to the Superior Court for further proceedings.

Philip C. Joslin, Ira Marcus, for Glass.

Charles P. Sisson, Assistant Attorney General, for Board.

BESSIE LEVINE vs. SOLOMON LEVINE.

NOVEMBER 18, 1921.

PRESENT: Sweetland, C. J., Vincent, Stearns, Rathbun, and Sweeney, JJ.

(1) Writs. Ne Exeat.

Under a writ of ne exeat, commanding the sheriff to cause the respondent to give bail or security, the sheriff was authorized to take a cash deposit in the amount named in the writ.

(2) Divorce. Allowance. Registry of Court. Sheriffs. Appeal.

Where a respondent who had given security to the sheriff in the sum of five hundred dollars under a writ of ne exeat, was ordered in separation proceedings to pay an allowance to the petitioner and a further sum for counsel fees, and execution was issued against him and returned unsatisfied, and an order was entered directing the sheriff to pay into the registry of the court the amount of the security held by him less an allowance for his counsel fees and permitting the petitioner to withdraw the amount due her for support, etc., and the sheriff appealed;

Held, that while it was competent for the Superior Court to order the payment of the money into its registry, an appeal was statutory and there was no provision of statute for an appeal in such a case and the appeal would be dismissed.

Held, further, that a sheriff as an officer of the court was subject to its orders and had his remedy in a proper proceeding to test the validity of an order made upon him.

DIVORCE. Heard on appeal of the sheriff of Providence county from an order of the Superior Court. Appeal dismissed.

VINCENT, J. The petitioner, Bessie Levine, on May 26, 1921, filed her petition in the Superior Court for Providence county for a separation from the bed and board of her husband, Solomon Levine, and also a petition for an allowance for the support of herself and minor child and for counsel and witness fees.

On the same day the said petitioner also filed a petition for a writ of Ne Exeat representing that the respondent was about to leave the State in order to evade any order or orders which the court might enter upon her petition for separation or for an allowance for her support, counsel and witness fees, and praying that said respondent should be restrained from so doing.

On the same day a writ of Ne Exect was issued directed to the sheriffs of our several counties or their deputies commanding them to cause the respondent to give bail or security in the sum of \$500 that he will not go or attempt to go into parts beyond this State without leave of court and that in default of such bail or security to commit the respondent to jail.

On the following day, May 27, 1921, service of this writ was made by a deputy sheriff who arrested the body of the respondent and accepted from him the sum of \$500 in cash as surety. On the 4th day of June, 1921, a decree was entered in the Superior Court ordering the respondent to pay to the petitioner for the support of herself and minor child the sum of \$15 per week beginning June 4, 1921, and \$10 for witness fees and \$50 for counsel fees to be paid by September 1, 1921.

The respondent having failed to comply with the terms of this decree, an execution was issued in the sum of \$300 on

September 27, 1921, and placed in the hands of a deputy sheriff commanding him to levy the same upon the goods and chattels of the respondent and for want of such goods and chattels to arrest the body of said respondent and commit him to jail.

On October 8, 1921, this execution was returned wholly unsatisfied, the officer being unable to find the respondent or any goods and chattels upon which such execution could be levied.

On October 8, 1921, the petitioner filed a petition praying for the entry of an order directing the sheriff to apply from the cash in his hands, offered and paid to him by the said respondent, so much thereof as might be needed to satisfy the arrearages for support, counsel and witness fees.

On October 20, 1921, after a hearing upon this last-named petition, a decree was entered thereon in the Superior Court (1) allowing the sheriff the sum of \$75 for the fee of counsel appearing in his behalf, (2) ordering the sheriff to pay into the registry of the court the balance amounting to \$425 and (3) permitting the petitioner to withdraw from the registry of the court the amount due her for support, counsel and witness fees.

From this decree the sheriff, Jonathan Andrews, has taken an appeal to this court and says, "that said order and decree are against the law."

A sheriff is an officer of the court and subject to its orders and directions. If he desires to test the validity of any order made upon him by the Superior Court, there are wellknown proceedings or remedies which he may invoke or pursue.

We think it is competent for the Superior Court to order the payment of the money in question into its registry. An appeal is a creature of statute and is only available to those to whom the privilege of appeal is thereby extended.

There is no provision of our statute for an appeal in a case like the one now before us and we therefore think that it must be dismissed. In reaching this conclusion we have

not considered the legality or propriety of taking what is popularly called "cash bail" in other cases where bail is required.

Under the command in the writ of *Ne Exeat* the officer could, in his discretion, take either bail or security. He saw fit to take a cash deposit in the amount named in the writ and we cannot see how any better security could have been obtained.

The appeal is dismissed and the case is remitted to the Superior Court for further proceedings.

Charles Z. Alexander, for petitioner.

Philip V. Marcus, for respondent.

Charles A. Walsh, for the Sheriff.

FRED A. COUGHLIN vs. RHODE ISLAND Co.

DECEMBER 4, 1921.

PRESENT: Sweetland, C. J., Vincent, Stearns, Rathbun, and Sweeney, JJ.

(1) Street Railways. Automobiles. Passengers.

A passenger in an automobile, who was not on the lookout for trolley cars, and first saw the car which collided with the automobile, when it was about thirty-five feet away, after the automobile turned into an intersecting street, cannot be held negligent as a matter of law, where there was nothing unusual in the conditions at the junction of the streets.

- (2) Street Railways. Automobiles. Negligence of Driver. Passengers.
- Negligence on the part of the driver of an automobile is not to be imputed to a guest and generally the question of the contributory negligence of such guest is a question for the jury.
- (3) Street Railways. Automobiles. Passengers. Duty to Look.
- The duty of a passenger in an automobile to look is dependent on the circumstances, and in the absence of knowledge of danger, or of facts which should give him such knowledge, he may properly rely upon the driver. The passenger is not however relieved of all care but the amount of care required, varies with the circumstances.
- (4) Street Railways. Negligence. Rate of Speed Fixed by Ordinance.
- That the rate of speed of a trolley car did not exceed that allowed by ordinance is not conclusive proof of the exercise of due care by the defendant, but is

simply evidence bearing upon the question of defendant's care and is to be considered by the jury in connection with the attending circumstances in the decision of this issue.

TRESPASS ON THE CASE for negligence. Heard on exceptions of defendant and overruled.

STEARNS, J. This is an action of trespass on the case for negligence, to recover for injuries to plaintiff caused by collision between an automobile in which plaintiff was riding and a trolley car of defendant company. After a trial by jury, which resulted in a verdict for plaintiff, and the denial by the trial justice of defendant's motion for a new trial, the case is now in this court on defendant's bill of exceptions.

The accident occurred in the evening of November 4, 1919, on Westminster street near the junction of Empire street in the city of Providence. Plaintiff was invited to ride to his home by a friend, John H. McGough, in a small enclosed automobile, which was owned and driven by Mr. McGough. The automobile was driven south on Empire street, which is a wide street running north and south, to the junction of Westminster street, which latter street runs east and west. At the junction of the two streets McGough turned into Westminster street intending to proceed on that street in an easterly direction and shortly thereafter the automobile came into collision with a trolley car which was running westward on Westminster street. McGough testified that he saw the trolley car two hundred fifty to three hundred feet distant as he turned into Westminster street; it was raining and the street and car rails were slippery; the left hand wheels of his automobile were caught in the trolley track in such manner that he was unable to get clear of the track: the street was well lighted and there was no other vehicle or any obstruction between the automobile and the trolley car; he was travelling slowly, but the trolley car was driven at an excessive and high rate of speed, which he alleges was negligent and the cause of the accident.

The motorman, an employee of defendant, testified that the automobile turned onto the track from Empire street; the power was shut off his trolley car at the time, that he did all that he could to stop the trolley car, which travelled only about ten feet from the time he first saw the automobile to the place of the collision and that his trolley car was practically at a standstill when it was struck by the automobile. One witness testified that the trolley car was running about twenty miles an hour and that its speed was but slightly reduced at the time of the collision. All the witnesses agree that there was a loud crash caused by the collision and that the left side of the automobile was wedged in under the bumper of the trolley car so firmly that it was found to be necessary to jack up the trolley car in order to extricate the automobile. The force of the collision was considerable and the conclusion from the uncontradicted evidence is reasonable that one or both of the colliding cars was moving with considerable speed at the time of the collision.

By ordinance of the city of Providence it is provided that trolley cars shall not be propelled faster than six miles an hour on this part of Westminster street. Defendant objected and took an exception to the introduction of this evidence by plaintiff.

The plaintiff was a passenger and a guest in Mr. McGough's car and had nothing to do with the operation or control of the automobile. He sat on the right hand of the driver as the automobile turned into Westminster street. He testifies that he was not paying any particular attention to the driving of the automobile, was not on the lookout for trolley cars and that he first saw the trolley car when it was about four lengths of the automobile or about thirty-five feet distant from the automobile and that he did not know exactly the rate of speed the trolley car was running at that time.

At the conclusion of the testimony defendant moved the trial court to direct a verdict in its favor on the ground that plaintiff was guilty of contributory negligence as a matter of law. This motion was denied. The action of the court Taking a view of the evidence most favorable to the defendant, the utmost defendant can properly claim is that the question was one of fact to be left to the jury. The issue was submitted to the jury with suitable instructions by the trial justice. If McGough's version was substantially correct, the failure of plaintiff to look before turning the corner was immaterial. McGough saw the car in ample time and was trying to get off the trolley track but was prevented from doing so by the skidding of his car. On defendant's theory of the case it is difficult to see how plaintiff, the passenger, can be said to have had any reasonable opportunity or time to have communicated McGough before the collision occurred.

It is conceded by defendant that the negligence of the driver of the automobile is not to be imputed to a guest in (2) the automobile and that generally the question of contributory negligence of such a guest is a question for the jury. Hermann v. R. I. Co., 36 R. I. 447. The claim is made in this case that it was the duty of the passenger as a matter of law to look for the approach of a car, as the street corner was a place of danger. There was nothing unusual in the conditions at the junction of the two streets, and no other danger than such as usually is found at the intersection of many city streets. The duty of the passenger to look is one which is dependent on the circumstances. The driver of the automobile is bound to keep a practically continuous outlook while driving, but no such duty is imposed on the passenger. In the absence of knowledge of danger or of facts which should give him such knowledge, a passenger or guest (3) may properly rely on the driver to attend to the driving of the automobile. The primary duty of care for the safe operation rests upon the driver. The passenger however is not relieved from the exercise of all care for his own protection, but the amount of care required of a passenger necessarily varies with the circumstances of each case. We find nothing erroneous in the comments of the court on the facts or in the statement of the law applicable thereto. The issues were properly submitted to the jury.

Defendant requested the trial court to charge, as follows: "If the jury find that when the automobile reached the car track, and was proceeding toward the electric car, the electric car was not going faster than six miles per hour, the

plaintiff can not recover." This request was refused and exception to this ruling is now pressed. Defendant's claim is that if a trolley car is proceeding at a rate of speed within that allowed by the city ordinance it can not in any case be held to be travelling at an excessive rate of speed. v. Union R. R. Co., 27 R. I. 499, it was held that violation of a statute or municipal ordinance limiting the rate of speed or the management of street railways did not necessarily amount to negligence as a matter of law but that evidence of such violations was relevant and prima facie evidence upon the question of defendant's negligence. page 503 the court says: "The office of such ordinances in civil cases is to be used by the jury as aids in determining the question of negligence. The province of the jury is not to determine that a given act is negligent because it is a violation of an ordinance or regulation, but to declare such an act to be negligent because it is not marked by the degree of care which the circumstances impose. The ordinance is one of the circumstances only which they are to take into (4) account." In the case at bar evidence that the rate of speed was not in excess of six miles an hour, the limit allowed by the ordinance, is not conclusive proof of the exercise of due care by defendant but is simply evidence bearing upon the question of defendant's care and is to be considered by the jury in connection with the attending circumstances in the decision of this issue. The question whether the speed is improper or excessive is to be determined not by the limits fixed by statute or ordinance but upon consideration of the reasonableness of the rate of speed in the circumstances. To move a trolley car at all in some cases might be improper and negligent and consequently the rate of speed might then properly be held to be excessive. This exception is overruled. The damages are not excessive.

All of defendant's exceptions are overruled and the case is remitted to the Superior Court with direction to enter judgment on the verdict.

Cooney & Cooney, for plaintiff.

Clifford Whipple, Earl A. Sweeney, for defendant.

GEORGE D. GLADDING, Ex. vs. EDWARD ATCHISON et al.

DECEMBER 7, 1921.

PRESENT: Sweetland, C. J., Vincent, Stearns, Rathbun, and Sweeney, JJ.

- (1) Pleading. Exceptions.
- By pleading to an action without objection to its form, and by proceeding with the trial without objecting thereto at any stage of the proceedings a defendant is precluded from raising such objection at the hearing of exceptions to the decision of the lower court.
- (2) Actions Against State.
- Whether or not an action is a suit against the State will be decided not by reference simply to the parties of record but upon consideration of the essential nature of the suit and the effect of the judgment therein.
- (3) Pleading. Exceptions.
- Where demurrer was sustained to special pleas and no exception taken to the decision, and the case went to trial and decision was given for plaintiff to which defendant filed exceptions, on hearing on bill of exceptions the special pleas and the facts alleged therein will not be considered.
- (4) Shell Fisheries. Actions. Shellfish Commissioners.
- An action was brought against the shellfish commissioners as individuals to recover the surplus proceeds from the sale of oyster leases after sale by the commissioners under Gen. Laws, cap. 203, sec. 26. The leases contained covenants against assigning the premises without the written consent of the commissioners. To the action defendants filed a plea in set-off alleging in part that certain other leases, not under seal, were taken by a third party as agent for the plaintiff who was an undisclosed principal.
- Held, that the doctrine of undisclosed principal was not applicable and it was immaterial whether the leases were under seal or not, for admitting such

claim the result would be to make the statutory provisions against assignment inoperative.

Held, further, that the claims in set-off were claims of the State and not of the commissioners and as they were not claims which belonged to defendants in their own right for which they might maintain a suit in their own names, they were not properly subjects of set-off in the action.

- (5) Shell Fisheries. Surplus After Sale of Leases. Actions Against State.
- The duties of the Shellfish Commissioners under sec. 26, Gen. Laws, cap. 203. where a surplus of proceeds remains after sale, is to pay such surplus to the lessee, and the lessee has a valid claim against the individuals having such surplus in their possession and if the commissioners pay it over to the State treasurer, they do so of their own wrong and cannot claim exemption from suit by lessee on the ground that by their wrongful act the State has come into possession of money belonging to lessee.
- (6) Shellfish Commissioners. Actions Against State. Judgment.
- In an action against the Shellfish Commissioners as individuals to recover the surplus proceeds from the sale of oyster leases after sale by the commissioners under Gen. Laws, cap. 203, sec. 26, the judgment would run against the defendants individually and the State not being a party, is not bound by it.
- (7) Actions Against State.
- The mere fact that the State may have possession of property does not in itself determine the question whether the State is the real defendant in an action nor does it preclude inquiry by the court into the lawfulness of that possession or the right of the State to retain it.

Assumpsit. Heard on exceptions of defendants and overruled.

Stearns, J. This is an action in assumpsit with the common counts brought by plaintiff, the executor of the Estate of Ardelia C. Dewing, as trustee, for the use of Brayton A. Round et al., trustees in bankruptcy of the M. Dewing Co., a Connecticut corporation, to recover the surplus proceeds from the sale of certain oyster leases owned by Ardelia C. Dewing.

The sale was made by defendants under the provisions of Section 26, Chapter 203, Gen. Laws, and the proceeds thereof were received by the defendants who at the time were the Shellfish Commissioners of the State of Rhode Island. The action was brought against the defendants as individuals. In addition to the general issue defendants

filed several special pleas alleging, among other claims, that as such commissioners they were the agents of the State, that the money sued for was owing and belonged to the State and was received by defendants in their capacity as agents of the State acting in the name of and under authority of the State; that all of said money before action was begun had been paid over to the General Treasurer of the State. Plaintiff demurred to the special pleas and the demurrers were sustained. It was held that the action was not one against the State, and that plaintiff was entitled to sue the defendants to recover for their failure to pay over to him the surplus proceeds as required by statute. No exception to this decision was taken by defendants. On motion made defendants were then permitted to file a plea in set-off, in which they alleged that plaintiff was indebted to defendants in their capacity as commissioners of shell fisheries of the State, acting for and in behalf of said State in the sum of \$4,796.88 by book account due and owing for rental under certain leases of ovster grounds, for interest and certain other charges and expenses incident to the sale of said leases, as follows: "account A on leases Nos. 594, 586, 687 issued to Ardelia C. Dewing \$639.44." "account B on leases Nos. 883, 884, 939, 940, 942 not under seal, issued in the name of George D. Gladding, the said George D. Gladding being then and there the agent for an undisclosed principal, namely, the agent of Ardelia C. Dewing." Then follows an itemized statement of rentals due on said leases from 1913 to 1916, inclusive, with interest and other charges, the total being \$4,796.88, which defendant averred was due and owing from plaintiff to defendants, and which amount defendants claimed by way of set-off. Jury trial having been waived, the case was heard by the Presiding Justice of the Superior Court, who disallowed the claim in set-off and gave a decision for the plaintiff for \$6,219.65, which is agreed to be the amount due plaintiff unless the set-off claimed should be allowed.

The case is in this court on defendants' bill of exceptions whereby it is alleged that the decision of the Superior Court is erroneous and contrary to the evidence. There is no allegation in particular of any error in the proceedings. The sole question is in regard to the right of defendants to the benefit of the set-off as claimed. At the hearing in this court defendants for the first time made the claim that the form of action, assumpsit, was wrong. This objection, even if it were valid, which we do not consider it to be, is not properly before this court. Defendants have never raised this question in the trial court. By pleading to the action without objection to its form and by proceeding with the trial without objecting thereto at any stage of the proceedings, defendants are now precluded from raising this objection.

Another claim is that in effect the suit is against the State and the courts are as a consequence without jurisdiction in the matter. Although this question has already been decided adversely to defendants' claim, and without objection taken in the lower court, yet as perhaps it is involved to a certain extent in the decision of the claim of set-off we will consider it briefly.

Chapter 203, Gen. Laws, of "Private and Several Oyster Fisheries," provides for the election by the General Assembly of five commissioners of shell fisheries, who are empowered to lease in the name of the State "to any suitable person being an inhabitant of this State" certain designated lands as private oyster grounds, but not more than one acre at a time in one lot or parcel to one person or firm. Section 25 the commissioners are required to see that the terms of the leases are complied with and on failure of the lessee to pay rent punctually or on breach of the lease, the commissioners are required to enter on the leased land and They may in the name of the State terminate the lease. (Sec. 26) institute legal proceedings for the collection of rents, take possession of and sell at public auction any lot leased with the oysters thereon, and receive the proceeds of

such sale and they are then directed "from said proceeds to retain all sums due and owing the State for rent as aforesaid, together with all expenses incident to such sale, rendering and paying the surplus of said proceeds of sale, if any there be over and above the amounts so to be retained as aforesaid, to said lessee, his heirs, executors, administrators, or assigns."

There is practically no dispute in regard to the facts. Prior to 1914 Ardelia C. Dewing was engaged in the oyster business in this State. In addition to other leases from the State, Mrs. Dewing held twelve leases bearing date at different times from January 5, 1907 to January 27, 1912. each for ten years, which are the particular leases upon which plaintiff's claim is based; she also held three other leases, one dated May 22, 1905 and two dated January 29. 1906. The plaintiff Gladding, who was the manager of Mrs. Dewing's business, held six leases of oyster lands dated at different times from May 7 to September 27, 1907. In 1913 the M. Dewing Co. acquired the oyster business and property used therein belonging to plaintiff and Mrs. Dew-In 1914 this company was petitioned into bankruptcy. In 1915 Mrs. Dewing died and her estate was declared to be insolvent. In 1916 the commissioners of shell fisheries took possession of the twelve leases of Mrs. Dewing for nonpayment of rent due thereon, and sold the same with the oysters on the lots at public auction for \$12,100. commissioners also sold separately the six leases belonging to Gladding for \$37. At the time of this sale there was due to the State of Rhode Island from Gladding upon these leases the sum of \$4,157.44. Long prior to 1916 the commissioners had terminated the three leases of Mrs. Dewing. of the years 1905 and 1906, and there was due on these leases for rent, interest, etc., \$639.44. These leases were not included in the sale made in 1916. The two last mentioned claims, namely, the Gladding claim and the Dewing claim for \$639.44, constitute the basis of defendants' set-off.

The plaintiff, as executor, acting under authority of the Probate Court, assigned to the trustees in bankruptcy of the M. Dewing Co. all of the interest of the estate of Ardelia C. Dewing to the proceeds of the sale of the twelve leases and brings this suit for the benefit of the assignees.

(2) Is this a suit against the State? This question is to be decided not by reference simply to the parties of record but upon consideration of the essential nature of the suit and the effect of the judgment therein. In the Matter of the State of New York, 256 U.S. 490. The special pleas and the facts alleged therein are now out of the case. Wilson

(3) v. N. Y., N. H. & H. R. R. Co., 18 R. I. 598; Neri v. R. I. Co., 42 R. I. 229; Ilczyszyn v. Mostecki, 43 R. I. 523. There is now no plea or any formal suggestion on the record that this suit is one against the State, nor is there any proof that the money sued for is in the possession of the State under claim or color of title. The leases contain covenants by the State, the lessor, for quiet possession and by the lessee to pay a fixed amount annually to the State Treasurer, and that lessee will not underlet or assign the premises to any person without the assent in writing of the commissioners. It is not claimed that there was any written assignment made by Gladding and assented to by the commissioners. Whatever the relations may have been between plaintiff, Mrs. Dewing and the M. Dewing
(4) Co. the relation of the State with plaintiff remained un-

(4) Co. the relation of the State with plaintiff remained unchanged, namely, that of lessor and lessee. The doctrine of undisclosed principal is not applicable, and it is immaterial whether the leases were under seal or not. The Dewing Co. being a corporation is not permitted by the statute to take a lease from the State. If the State can hold Mrs. Dewing for the rents as an undisclosed principal she would be entitled, if the leases were not under seal, as against the State to hold the leases made to her alleged agent Gladding. Battey v. Lunt & Co., 30 R. I. 1. The result would be to make the statutory provisions against subletting and assignment inoperative and of no effect.

The purpose of the statute is clear. By limiting the persons who are eligible to receive leases to individuals who are inhabitants of the State and by restricting each lease to one lot, it is apparently the intent of the act to enable the commissioners to prevent any one person or firm from securing a monopoly of the oyster lands and to confine the benefits and obligations of the lease to the lessee named or (5) his duly recognized assignee. The debt of Gladding was a debt to the State and not to the commissioners. authority of the commissioners to sue therefor in the name of the State is permissive but not exclusive, as the State is not restricted to this one action by the commissioners. The duties of the commissioners under Section 26, where a surplus of proceeds remains after possession taken and public sale, are clearly defined by statute and require no exercise of discretion. They are to pay over the surplus arising from the sale to the lessee. This is the mandate of the State and the lessee has thereby a valid claim given to him by the State against the individuals who have such surplus in their possession. If the commissioners pay over this surplus to the State Treasurer they do this of their own wrong and contrary to law. They can not claim exemption from suit by the lessee on the ground that by their wrongful act the State has come into possession of money which belongs to the lessee. A judgment in this case would run against the defendants individually and the State, not being a party, is not bound by it. Tindal v. Wesley, 167 U. S. 204. The mere fact that the State may have possession of the property does not in itself determine the question whether the State is the real defendant nor does it preclude an enquiry by the courts into the lawfulness of that possession or the right of the State to retain it. U.S. v. Lee, 106 U. S. 196; Phila. Co. v. Stimson, 223 U. S. 605. claims in set-off are claims of the State and not of the commissioners. As they are not claims which belong to de-

fendants in their own right for which they might maintain a

suit in their own names (Sec. 11, Chap. 288, Gen. Laws), they are not properly subjects of set-off in this suit.

Defendants' exceptions are overruled and the case is remitted to the Superior Court with direction to enter judgment on the decision.

Curran & Hart, for plaintiffs.

Antonio A. Capotosto, Assistant Attorney General, for defendants.

FRANK J. RIVELLI et als. vs. Providence Gas Co.

CITY COUNCIL OF CRANSTON VS PROVIDENCE GAS Co.

DECEMBER 9, 1921.

PRESENT: Sweetland, C. J., Vincent, Stearns, Rathbun, and Sweeney, JJ.

- (1) Public Utilities Commission. Gas.
- Gen. Laws, cap. 345, sec. 53, providing a penalty for wilfully furnishing a meter which does not correctly register the quantity of gas consumed or for collecting a larger sum for gas than appears to be due upon inspection of the meter, does not penalize the collection of a service charge.
- (2) Public Utilities Commission. Gas. Service Charge.
- Upon appeal from an order of the Public Utilities Commission, finding service charge, for use of a gas meter, reasonable, evidence considered and held that such charge was legal, and as it applies to all consumers alike, it cannot be held to be unjustly discriminatory.
- (3) Public Utilities Commission. Gas. Reduction in Standard.
- Upon appeal from an order of the Public Utilities Commission finding that a reduction in standard of gas under the conditions existing was necessary evidence considered and appeal dismissed.

APPEALS from orders of Public Utilities Commission Appeals denied and dismissed.

Sweeney, J. These are appeals from an order and decree of the Public Utilities Commission dismissing the complaints of the appellants, and are heard together in this court upon the transcript of the evidence taken before said Commission.

The reason for the complaints was the filing, April 14, 1920, by the Providence Gas Company with the Commission, of a schedule of rates to take effect May 17, 1920. The schedule of rates thus filed increased the rates for gas, provided for a service charge of fifty cents for each meter each month, and lowered the standard of the gas.

The appellants filed objections to the proposed schedule with the Commission, and the city council of Providence also filed its objections to the proposed rates. All of said objections were heard together by said Commission in July, 1920, and at the same time the Gas Company was given an opportunity to introduce testimony to justify the changes made by its proposed schedule. Eight days were occupied in presenting testimony or reading exhibits, and the transscript of the evidence produced in this Court is voluminous.

The Commission made a careful examination and analysis of the evidence presented to it and found that the Gas Company had sustained the burden of proof imposed upon it by showing the necessity for the increased rate; that the service charge was reasonable; that the schedule of rates as filed was just and reasonable; and that the reduction in the standard of gas, under the conditions then confronting the Company, was necessary, and denied and dismissed the complaints on the 14th day of May, 1921.

The city council of Providence claimed no appeal from this action, but the city council of Cranston and the complainants Rivelli and others duly claimed appeals therefrom to this Court.

The appellants claim in their reasons of appeal that the imposition of the service charge is illegal and unreasonable; that the lowering of the standard of gas is unreasonable; and that the proposed schedule of rates is unjustly discriminatory.

The schedule of rates was filed by the Gas Company with the Commission as required by Sec. 48, Chap. 795, Public Laws, 1912, known as the Public Utilities Act, which provides, among other things, that no change shall be made in existing rates, excepting after thirty days' notice to the Commission and to the public of the changes proposed to be made in the schedule then in effect, and the time when the change of rates will go into effect. The Commission has no authority to fix rates for a public utility excepting when, after a hearing and investigation, it finds that the existing rates are unjust, unreasonable, insufficient or unjustly discriminatory, or to be preferential or otherwise in violation of the provisions of said Public Utilities Act. Sec. 21, Chap. 795, Public Laws, 1912.

The Commission found that the service charge made by the Company, in the schedule of rates under consideration, was reasonable and that if such a charge was not made it would be necessary to directly increase the price of gas. The appellants now claim that the service charge is

illegal because it is in violation of Sec. 53, Chap. 345, Gen-

eral Laws, 1909, which provides, among other things, that every person or corporation who shall wilfully collect a larger sum for gas than appears to be due on inspection of the meter put in to register the same shall be fined not exceeding five hundred dollars. This law does not penalize (1) the collection of a service charge. It only provides a penalty on any person or corporation for wilfully furnishing a meter which does not correctly register the quantity of gas consumed, or who collects a larger sum of money for gas than appears to be due upon an inspection of the meter. It imposes a penalty for using meters incorrectly registering the amount of gas consumed, or for wilfully collecting money for gas not shown by the meter to have been consumed.

The service charge is a uniform charge to all customers which, together with another charge based upon the amount of gas consumed as shown by the meter, constitutes the entire amount to be paid. The service charge is an equal distribution of those burdens incident to the manufacture and distribution of gas which should be borne by all consumers, irrespective of the quantity used. The consumer of gas

pays his equalized cost of the service, and neither the small consumer not the large one is compelled to carry a load that should be shared by both.

The principle of the service charge has been allowed by many public utilities commissions throughout the United States on the ground that it is equitable and just. In the case of the Rochester Gas & Electric Corp., Public Utilities Rep. Ann., 1921 A, p. 415 at p. 420, in allowing a service charge, the commission said: "The corporation provides and installs meters and it bears the expense of the pipe from the main to the property line. Here is an investment upon which it is entitled to a return and which is constant, whether gas is used or not used. Meters must be inspected and kept in repair and so must the service pipes. must be read whether gas is used or not, accounts must be kept with the individual consumer and bills must be rendered and accounts collected. While the rendition and collection of bills is not regardless of whether any gas is consumed, the expense in nowise relates to the amount of the consumption, and it is, therefore, a charge which should be distributed among the customers as a total. and services depreciate regardless of the consumption and the total depreciation depends upon the number of meters and number of services."

It would be possible to increase the rates for furnishing gas used so as to cover the service charge. When the consumer uses such a small quantity of gas that the profit upon it will not defray the cost of serving him with it, it is not unreasonable that he should be required to pay for such service in addition to paying for the gas used by him.

The Commission found that the reduction in the standard of gas was necessary under the conditions then confronting the Company. The Company presented testimony to show that it has ample equipment to produce coal gas and water gas in sufficient quantities to meet the requirements of the people living within the territory served by it. It was also shown that owing to the extraordinary conditions then

existing it was impossible for the Company to get its necessary supply of gas coal and oil to produce coal gas and water gas, at prices sufficiently low, to enable it to continue to sell gas to its consumers at the proposed rate without lowering the standard or quality of the gas. The testimony also showed that the lowering of the standard of gas would affect the use of gas for illuminating purposes but slightly, as only five per cent of the gas manufactured is used for this purpose, and the objection to the lower standard of gas could be easily overcome by the use of mantles instead of using the open flame burner; and that the lower standard of gas would affect but little its use for heating or industrial purposes.

The claim that the schedule of rates is unjustly discriminatory is based upon the claim that the service charge is illegal and places an unjust burden upon the so-called "small consumer." Inasmuch as we have held that the service charge is legal, and applies to all consumers alike, it

cannot be held to be unjustly disciminatory.

An analysis of the testimony is stated at length in the opinion of the Commission and it is unnecessary to incor-

porate it in this opinion.

After a careful consideration of the facts, as shown by the testimony and the law applicable thereto, the Court is of the opinion that the claims made by the appellants cannot be sustained and, therefore, the order and decree of the Public Utilities Commission appealed from is sustained and affirmed, and the appeals therefrom are denied and dismissed.

Frank J. Rivelli, Frank H. Wildes, for appellants.

Harold W. Thatcher, Frank H. Swan. Swan, Keeney & Smith, for appellee.

PHILIP L. HEBERT vs. ROSCOE W. BAKER. DECEMBER 19, 1921.

PRESENT: Sweetland, C. J., Stearns, Rathbun, and Sweeney, JJ.

(1) Taxation. Sale.

Although the tax had been properly assessed against each of several parcels of real estate, separately, all of the lots were sold by the collector of taxes as one lot for the total amount of taxes due on the different parcels.

Held, the sale was illegal and passed no title, for the result of such action was to deprive the owner of his statutory right to redeem a particular part of his land if he so desired.

TRESPASS AND EJECTMENT. Heard on exception of plaintiff and overruled.

STEARNS, J. This is an action of trespass and ejectment to determine the title to certain real estate. In the trial in the Superior Court, at the conclusion of plaintiff's testimony, the trial justice granted the motion of defendant for a nonsuit. The case is in this court on plaintiff's bill of exceptions in which the sole exception is to the granting of the nonsuit.

There is no dispute in regard to the facts.

Defendant, who owned certain real estate in the town of North Smithfield, was properly assessed annually for taxes for several years, by particular assessment on each parcel of real estate owned by him; for the same period certain other parcels of land belonging to the estate of one Joseph P. Baker were properly assessed separately. All of the above mentioned parcels of land, with the buildings thereon, constituted the farm occupied by defendant. As the taxes on all of these parcels of land were not paid, the collector of taxes of said town advertised the same for sale in separate parcels and thereafter sold the same at public auction to one Edward Atchison, by whom the premises were sold and conveyances were made by separate deeds to the plaintiff. Notice to quit was given by plaintiff to defendant, and upon refusal made by defendant, the present action was begun.

Although the taxes were assessed against each parcel separately, all of the lots belonging to defendant were sold

as one lot for the total amount of taxes, interest and expenses due on the different parcels. The same procedure was followed in the sale of the lots belonging to the estate of Joseph P. Baker. In the recitals of each of the tax deeds it was stated that the different parcels were sold as one for a lump sum to the highest bidder. Section 9, Chap. 60, General Laws provides that, "If any person is taxed for several parcels of real estate each of such parcels shall be liable for the payment of the tax assessed against it, even though the same may have been aliened, and no such parcel shall be liable for any tax assessed against any other Section 12 provides, "in all cases where any parcel of real estate is liable for payment of taxes, so much thereof as is necessary to pay the tax, interest, costs and expenses, shall be sold by the collector at public auction, to the highest bidder." By Section 18 it is provided that the owner of real estate sold for taxes may redeem the same within one year, upon repaying to the purchaser the amount paid therefor, with twenty per centum in addition. of real estate is thus made chargeable with the taxes due upon that particular parcel and the right of redemption attaches to the particular parcel. The effect of a sale of all the parcels together is to charge each parcel with the amount of taxes due upon all with the result that the owner is deprived of his statutory right to redeem a particular part of his land if he so desires. Such a sale is contrary to the provisions of the statute and is invalid. In the case at bar the collector of taxes, having made the sales in violation of the express provisions of the statute, could not convey any valid title to plaintiff's vendor and consequently the plaintiff has no title to the premises sued for.

The exception of the plaintiff is overruled and the case is remitted to the Superior Court with direction to enter judgment on the nonsuit.

William G. Rich, for plaintiff.

Herbert L. Carpenter, for defendant.

ARNOLD REALTY COMPANY vs. WILLIAM K. Toole Co.

DECEMBER 28, 1921.

PRESENT: Sweetland, C. J., Vincent, Stearns, Rathbun, and Sweeney, JJ.

- (1) Landlord and Tenant. Tenant Holding Over. Trespasser. Election of Remedies. Assumpsit.
- Where a monthly tenant after notice to quit holds over it is optional with lessor to treat him as a trespasser or tenant from month to month, an election to treat him as tenant being inferable from any unreasonable delay to proceed against him as a trespasser, as well as from words or acts directly recognizing him as tenant.
- (2) Landlord and Tenant. Election of Remedies.
- Where lessor elects to sue lessee in assumpsit for use and occupation of premises after the end of the term, he waives his right to afterwards take the inconsistent position of treating lessee as a trespasser during the same period and to sue in trespass.
- (3) Election of Remedies.
- Where the tort is of such a character as to afford plaintiff the right to sue in assumpsit as well as in tort, the adoption of one remedy is a conclusive bar to a resort to the other.
- (4) Election of Remedies. Discontinuance.
- Where plaintiff has his election between co-existing remedial rights, in assumpsit and tort, which are inconsistent, and has brought action, in assumpsit, and while this action is pending brings suit in trespass, he cannot discontinue the first action and proceed with the other.

TRESPASS. Heard on exceptions of defendant and sustained.

Sweeney, J. This is an action of trespass brought by writ issued out of the Superior Court on the 19th day of November, 1920. The writ and declaration were duly filed in court and the defendant filed a plea in abatement to the effect that there was then pending in said court between the same parties an action of assumpsit, brought by writ issued April 30, 1920, for the same matter. The plaintiff denied the averment of this plea and the court overruled it. The defendant then filed a plea of the general issue.

The record shows that this action of trespass was tried with said action of assumpsit and that, at the conclusion of

the plaintiff's testimony, the defendant made a motion for a nonsuit. The trial justice ruled that both actions were brought for the same cause and ordered the plaintiff to elect which action it would proceed with. The plaintiff elected to discontinue its action of assumpsit and proceed with its action of trespass. The trial justice then permitted the discontinuance of the action of assumpsit, against the objection of the defendant, and denied the motion for a nonsuit and the trial of the action of trespass proceeded. At the conclusion of the introduction of evidence, both parties made motions for direction of verdict. The trial justice denied the motion of the defendant and granted that of the plaintiff. The defendant claimed exceptions to said rulings and has duly prosecuted them to this court.

The question presented by the bill of exceptions is; did the plaintiff, by bringing its action of assumpsit, April 30, 1920, waive its right to bring its action of trespass, November 19, 1920, for the same cause?

The evidence shows that the defendant had been a tenant of the plaintiff from month to month for some years prior to January 1, 1920; that on the 2nd of January, 1920, due notice was given to it to quit and vacate possession of the demised premises on or before the 1st day of February, 1920; and that it did not do so but remained in possession thereof until the 1st day of March, 1920.

Upon these facts the plaintiff could have held the defendant liable as a trespasser, or as a tenant from month to month, under the law as laid down in the case of *Providence County Savings Bank* v. *Hall*, 16 R. I. 154, wherein it is stated at page 158, "If a tenant holds over without any new contract, it is optional with the landlord to treat him either as a trespasser or as tenant from year to year, in case the prior term was for a year or longer; and if the prior term was shorter than a year, then from term to term, according to such shorter term; an election to treat him as tenant, however, being inferable from any unreasonable delay to proceed against him as a trespasser, as well as from words or acts

directly recognizing him as tenant." This case has been cited with approval in the cases of *Mitchell* v. *Hyman*, 43 R. I. 267, and *Greene* v. *Walsh*, 43 R. I. 416. See also 24 Cyc. 1012.

During the month that the defendant held possession of the premises, the plaintiff did nothing to show that it elected to treat the defendant as a trespasser. The defendant gave up possession of the premises March 1, 1920, and on the 2nd day of March the plaintiff sent the defendant a bill for rent, electric light, and damages for the month of February, 1920, amounting to \$1,221.58. The defendant declined to pay this amount but offered to pay \$648.66 which it admitted to be due. The plaintiff refused to receive the sum offered and, April 30, 1920, commenced an action of assumpsit against the defendant to recover the damages sustained on account of the defendant remaining in possession of said premises during said month of February.

The action in assumpsit was commenced by writ of attachment and the affidavit of the attorney for the plaintiff is that the plaintiff has a just claim against the defendant which is due, and upon which it expects to recover in said action a sum sufficient to give jurisdiction to the court to which the writ is returnable. The first count in the declaration in this action charges that the defendant remained in possession and occupation of said premises until March 1, 1920, and that the plaintiff suffered special and general damages on account of the failure of the defendant to vacate and deliver possession of the same. The second count is for electricity used during February, 1920, of the value of of \$54.91, and then are added the common counts including one for use and occupation.

Two additional counts were filed to this declaration November 23, 1920, the first alleging that it was the duty of the defendant to quit and vacate said building on or before February 1, 1920; that defendant did not perform this duty; and that on account of its breach the plaintiff sustained special and general damages. The second count

charges that the defendant did not vacate said premises February 1, 1920, but remained in occupation and possession of the same until March 1, 1920, and hence became legally bound to pay the plaintiff for the use and occupation of said premises at the rate of \$1,166.67 per month for such period as the defendant should continue to use and occupy said premises after said 1st day of February, 1920. A demurrer was filed to these additional counts which was overruled and exception noted, and then the defendant filed a plea of the general issue.

- Failing to treat the defendant as a trespasser during the **(2)** month of February, the plaintiff had a right to waive the tort and sue in assumpsit, at the expiration of the month, for use and occupation of the premises. Electing to sue the defendant in assumpsit for use and occupation during the month of February, the plaintiff waived its right to afterwards take the inconsistent position of treating defendant as a trespasser during the same month and to sue in trespass. "It is a well-settled rule that where a party has two causes of action, inconsistent with each other, an election to proceed upon either is a waiver of the other. For example, if one has the right to affirm or to repudiate a transaction, he cannot, after taking one of these positions, be heard to maintain the opposite." Whipple v. Stephens, 25 R. I. 563. Dziekewicz v. Butkewicz, 35 R. I. 221. 20 C. J. 29, sec. 20.
- It is a general rule that, where the tort is of such a char(3) acter as to afford the plaintiff the right to sue in assumpsit
 as well as in tort, the adoption of one remedy is a conclusive
 bar to a resort to the other. Roberts v. Moss, 17 L. R. A.,
 N. S. 280, note; Frisch v. Wells, 200 Mass. 429:

The plaintiff, having made his election between coexisting remedial rights which are inconsistent, cannot discontinue the first action and proceed with the second for the weight of authority is that the commencement of

(4) any proceeding to enforce one remedial right, in a court having jurisdiction to entertain such proceeding, is such a decisive act as constitutes a conclusive election barring subsequent prosecution of inconsistent remedial rights. 20 C. J. 29.

The defendant's exceptions to the action of the trial justice directing a verdict for the plaintiff and refusing to direct a verdict for the defendant are sustained.

The plaintiff may appear before this court, if it shall see fit, on Wednesday, January 4, 1922, at ten o'clock A. M., and show cause, if any it has, why an order should not be made remitting the case to the Superior Court with direction to enter judgment for the defendant.

Gardner, Moss & Haslam, for plaintiff.

Lee, Boss & McCanna, for defendant. George J. Sheehan, Sigmund W. Fischer, Jr., of counsel.

New England Trust Company of Boston, Trustee vs. Henry Brown.

JANUARY 16, 1922.

PRESENT: Sweetland, C. J., Vincent, Stearns, Rathbun, and Sweeney, JJ.

(1) Wills. Vested Interest. Income.

Where the full enjoyment of a vested interest is postponed until the beneficiary arrives at his majority, unless the will shows an intention that the income upon such vested interest shall be accumulated and not paid to the beneficiary until he reaches his majority, he is entitled to receive the same as and when it accrues.

BILL IN EQUITY for construction of will and instructions.

SWEETLAND, C. J. This is a bill brought by the trustee named in the will of Mary Elizabeth Woodhull Perry, late of the town of Middletown, deceased, for the construction of certain trust provisions contained in said will and for instructions. The cause being ready for hearing for final decree has been certified to this court for determination.

The testatrix died on December 10, 1910. Her will was duly probated. The executors after paying certain bequests and fully administering the estate turned over the

residue to the complainant to be held by it in trust in accordance with the terms of the will. The provisions of the trust, material to the question before us, are as follows: The complainant as trustee is directed first, to invest said residue and from the income to pay to three persons named "an annuity of two thousand dollars each for and during the term of each of their lives," second, "to pay unto Anna Charlotte Moser Fuller if living, and if not living to pay unto her children in equal shares, an annuity of five thousand dollars for the term of ten years" after the death of the testatrix, third, to pay to eight persons named, if living, an annuity of one thousand dollars each for the term of ten years after the death of the testatrix, fourth, to add any remaining income to the principal of the trust during the term of ten years after the death of the testatrix. That portion of Clause XXVI of the will, with regard to the construction of which the question before us arises, "Clause XXVI. At the end of the term of is as follows: ten years from my death said trustee shall pay over the principal of said trust fund (other than such portion as may be necessary to retain, if any, to pay the three annuities) discharged of all trust in equal shares to those of the following named persons who may be living at that time, namely." The testatrix then names forty-eight persons. "In the event that either of the above named parties shall not have arrived at the age of twenty one years the said trustee shall retain his or her share until he or she shall have arrived at said age."

Upon the payment to it of the residue of the testatrix's estate the complainant proceeded to administer the trust in accordance with its provisions. The period of the ten year annuities ended on December 10, 1920. Before that time one of the life annuitants had died. Subsequent to December 10, 1920, after setting aside a portion of the trust estate sufficient to pay the annuities to the two life annuitants then surviving, the trustee divided the trust fund remaining in its hands into as many equal shares as there were bene-

ficiaries mentioned in said Clause XXVI who were living on December 10, 1920, at the termination of the period of ten years from the death of the testatrix. To each of the beneficiaries named in said clause who was living on December 10, 1920, and who had arrived at the age of twenty-one years the complainant, trustee, has paid or is ready to pay one of said equal shares. The share of any beneficiary, living on December 10, 1920, who at that time had not arrived at the age of twenty-one years the complainant retained, awaiting the time when such beneficiary should attain that age. The respondent Henry Brown, one of the beneficiaries named in said clause, is still a minor and the trustee has retained his share.

The respondent claims that until his majority he is entitled to receive the income of his share, so retained, as such income accrues. The trustee is in doubt as to its duty in that regard and has in its bill asked for instructions upon that point. Also said complainant in open court has withdrawn its request for instructions upon other matters.

The interest of the respondent in his share is vested. (1) Unless the will shows an intention on the part of the testatrix that the income upon such vested interest should be accumulated and not paid to the respondent until he reaches his majority, he is entitled to receive the same as and when it accrues. This is in accord with the rule approved by this court as to income arising upon a vested interest when by the terms of its creation the full enjoyment of such vested interest is postponed. Rogers v. Rogers, 11 R. I. 38 at 76; Butler v. Butler, 40 R. I. 425; Aldrich v. Aldrich, 43 R. I. 179.

The amount of the respondent's share was fixed at the time of the division of the trust fund, at the end of the ten year period. It was vested although the time of payment was deferred. The right to the income upon this vested interest is also vested in the respondent. The will contains no express provision that the payment of the vested income as well as the vested principal shall be postponed; and such

intention on the part of the testatrix will not be inferred in the absence of some provision in the will from which an inference of such intention may fairly be deduced. The complainant calls our attention to the provisions that during the ten year period the surplus of income over the amount required to pay the annuities should be added to the principal. The complainant urges that this indicates a general scheme of the testatrix with regard to income, which would require its accumulation upon the respondent's share until the time for payment of the share arrived. There is not such a connection between the two matters as to warrant the inference which the complainant would have us draw. During the ten year period the paramount purpose of the testatrix was that there should be sufficient income from the trust estate to satisfy the annuities, and she might well require that any surplus of income should go to augment the principal the better to insure the fulfillment of that purpose, in any contingency. Whatever may have been the testatrix's purpose, however, in providing that surplus income should be added to the principal of the trust estate during the ten year period, that provision furnishes no sufficient basis for the assumption that the testatrix intended, what she has not expressed, that the income on the respondent's vested share should be accumulated.

Our conclusion is that until the respondent arrives at the age of twenty-one years, and until his share is paid to him by said trustee, the respondent is entitled to receive the income upon said share as and when it accrues. During the respondent's minority such payments should be made to the respondent's guardian for the use and benefit of the respondent.

The parties may present to us a form of decree in accordance with this opinion.

Burdick & MacLeod, for complainant. Howard B. Gorham, for respondent. HERBERT C. LAWTON vs. NEWPORT INDUSTRIAL Co.

JANUARY 6, 1922.

RESCRIPT.

(1) Assumpsit. Common Counts. Quasi Contracts. Unjust Enrichment. In an action for breach of contract, where there was no evidence that plaintiff did not in good faith endeavor to strictly perform, and defendant retained and used a portion of the material installed by plaintiff, although there may not have been strict performance by plaintiff, nevertheless where the labor and materials furnished by plaintiff are clearly in excess of any damage shown by the evidence that defendant suffered, defendant will not be permitted to be enriched at the expense of the plaintiff and plaintiff may recover under a quantum meruit.

Assumpsit. Heard on exceptions of defendant and overruled.

PER CURIAM. This is an action in assumpsit to recover for labor and materials furnished in installing two separate heating systems for the defendant.

The declaration alleges that said systems were installed in accordance with a special agreement entered into by the parties; that the price agreed upon for installing the two systems was \$4,823. The declaration contains also the common counts.

The trial of the case in the Superior Court resulted in a verdict for the plaintiff for \$4,394.50. The case is before this court on the defendant's exception to the ruling of the trial court denying defendant's motion for a new trial, on defendant's exceptions taken to the admission and exclusion of testimony and on defendant's exception to the refusal of the trial court to instruct the jury as requested.

Before the work was commenced the plaintiff prepared specifications and also a written contract but the contract was never executed. The testimony shows that the parties agreed that Pierce, Butler & Pierce down-draught boilers were to be installed as a part of each system and that the cost price for installing the two systems was \$4,823. The

unexecuted contract contained the following clause: "This heating system, if installed in accordance with the plans and specifications, will heat building referred to herein to 70 degrees inside temperature when outside temperature is zero."

The houses in which the heating systems were installed were in the process of construction when the agreement between the parties was entered into and the chimney in one house, at least, was partially erected. Each chimney was constructed with a flue 12 x 12 inches. The plaintiff testified that he told the defendant's agents that the Pierce, Butler & Pierce boilers required a chimney flue 16 x 16 inches and that the defendant through its agents agreed to assume the risk of the flues being too small. The defendant denied that it agreed to assume said risk. The plaintiff admitted that each of the systems as installed by him failed to produce a proper circulation of steam and that coal would not burn freely under the boilers. The plaintiff contends however that the unsatisfactory results were not due to any fault in the systems but to lack of draught resulting from the construction by the defendant of inadequate flues and the use of each chimney in connection with a separate system for heating water.

The defendant introduced testimony that the plaintiff's work was defective in that some of the lateral steampipes did not pitch sufficiently toward the boiler. The defendant's experts testified that the systems were not provided with sufficient radiation. Defendant submitted testimony as to the estimated cost of correcting the plaintiff's defective work and also as to the cost of the extra radiation, which has not been installed but which the defendant contends is necessary to heat the houses in question.

Before suit was commenced the defendant ordered the plaintiff to remove the two boilers. The plaintiff refusing to comply with this order, the defendant substituted other boilers of a different type for the boilers installed by plaintiff and stored the latter boilers on the premises.

The primary issue to be considered in this case is, first, whether the failure of the systems to function was due to the chimney flues being of insufficient size and, second, if the flues were too small did the defendant agree to assume the risk of flues 12 x 12 inches being inadequate? There was testimony which, we think, warranted the jury in finding both of these issues in favor of the plaintiff.

The defendant's first three requests are to the effect that the plaintiff can not recover if he has failed to complete his (1) contract. The declaration contains a quantum meruit count. The testimony shows that the defendant intended to retain and is using all of the two systems excepting the boilers and there was no contention that it would cost the defendant any sum, even, approximating the contract price to make the alterations including new boilers and extra radiation which the defendant contends are necessary to produce the systems which the plaintiff agreed to furnish and install. The defendant decided to retain and is enjoying the benefits of labor and materials, furnished by the plaintiff, of a value clearly in excess of any damage which the defendant suggests by evidence that it has suffered by reason of the alleged breach of contract. It is not suggested that the plaintiff did not in good faith endeavor to strictly perform the contract. Under the circumstances the defendant is not entitled to be enriched at the expense of plaintiff even although the plaintiff broke his contract. See 13 Corpus Juris. 690.

The fourth request assumes that the issues relative to the size of the chimney flues are not in the case. The justice who presided at the trial has denied the defendant's motion for a new trial and we find no reason for disturbing the verdict of the jury which has the approval of the trial court.

All of defendant's exceptions are overruled and the case is remitted to the Superior Court with direction to enter judgment on the verdict.

Burdick & MacLeod, and William A. Peckham, for plaintiff.

Max Levy, for defendant.

MARJORIE WILCOX GRANT VS. LAURA L. WILCOX.

JANUARY 17, 1922.

PRESENT: Sweetland, C. J., Vincent, Stearns, Rathbun, and Sweeney, JJ.

(1) Equity. Actual Fraud.

When a bill in equity charges actual fraud, no matter what other allegations it may contain, the complainant stands or falls on that charge alone, as no other issue is before the court.

BILL IN EQUITY. Heard on appeal of complainant from decree dismissing the bill. Decree of Superior Court modified and affirmed.

RATHBUN, J. This is a bill in equity praying that the complainant's deed conveying certain real estate, described in the bill, to the respondent be set aside or in the alternative that the respondent be decreed to hold said real estate in trust for the complainant. The cause is before this court on the complainant's appeal from a decree of the Superior Court dismissing the bill.

The essential allegations in the bill of complaint are that Andrew J. Wilcox died January 8, 1918, intestate, leaving surviving him a widow, Laura L. Wilcox, the respondent, and as the sole heir-at-law Marjorie I. Wilcox (Mrs. Marjorie Wilcox Grant), the complainant, a daughter by a former marriage; that Andrew J. Wilcox died seized and possessed of the real estate in question: that the complainant had for many years lived at home under the control and the dominion of her father, Andrew J. Wilcox, and her stepmother, the respondent: that up to the time of the death of her father the complainant had had no business dealing or experience and was entirely ignorant of the law governing distribution of her father's estate and of her rights therein: that upon the death of Andrew J. Wilcox the respondent assumed the charge and control of the complainant and stood in loco parentis towards her in all things; that on January 22, 1918, the Probate Court of the town of North Providence granted to the respondent letters of administration on the estate of said Andrew J. Wilcox; that the respondent, together with one Frank B. Reynolds, importuned the complainant to execute a deed conveying to the respondent the real estate in question and to make a will in favor of the respondent: that the respondent and said Reynolds represented to the complainant that, unless she executed such a deed, it would be necessary to sell all of the property constituting the estate of said Andrew J. Wilcox but that if she would execute such a deed to the respondent it would not be necessary to sell any of said property and that the complainant and respondent could continue to occupy their home and keep the stock and other property located there; that respondent and said Reynolds further represented to the complainant that it was necessary that said real estate should stand in the name of the respondent until the estate of Andrew J. Wilcox was settled; that said respondent promised and agreed that she would reconvey said real estate upon the settlement of said estate; that the complainant after much urging and advising by the respondent and said Reynolds, trusting and believing in their statements and promises, conveyed without consideration to the respondent all of the complainant's interest in the real estate in question; that the complainant, finding said representations and statements in regard to the necessity of transferring the real estate to be false and fraudulent, requested the respondent to reconvey said real estate and that the respondent has refused so to do.

The case was heard by a justice of the Superior Court on bill, answer and proof. When the complainant rested her case said justice dismissed the bill and entered a decree containing the following language:

"FIRST: That no false and fraudulent representations or statements were made by respondent or any other person in her behalf to the complainant whereby she was induced to execute the deed set forth in the Bill of Complaint.

"SECOND: That apart from any question of fraud the testimony failed to show that the respondent took any

advantage of her relationship to the complainant, or that said respondent held the real estate, set forth in the deed complained of, in trust for the complainant."

Said justice found that the complainant had failed to prove that actual fraud had been committed upon her and it appears from the record that said justice was of the opinion that inasmuch as the complainant had failed to establish her charges of actual fraud it was his duty to dismiss the bill without making further findings. However, said justice at the request of the parties and for the purpose of completing the record did proceed to make other findings, and found that no advantage was taken of the complainant; that she understood and appreciated what she was doing when she made the conveyance and that it was her voluntary intention to give said real estate to the respondent.

We think that said justice after finding that the complainant had failed to establish her charge of actual fraud should have dismissed the bill without making other findings. When at the hearing it appears that charges of actual fraud in a bill of equity have not been established, the rule in this State is that the bill will be dismissed notwithstanding that it states other grounds upon which relief might be granted. Mt. Vernon Bank v. Stone, 2 R. I. 129; Tillinghast v. Champlin, 4 R. I. 173; Schuyler v. Stephens, 27 R. I. 479; Gilbane v. Union Trust Co., 103 Atl. 485. terson v. Finnigan, 2 R. I. 316 and in O Connor v. O'Connor, 20 R. I. 256, the principle was sustained but for reasons appealing to the court the complainant was permitted, after paying all costs and amending by striking out all allegations of fraud, to proceed with the bill. In Aldrich v. Wilcox, 10 R. I. 405, the court makes it clear that the rule applies only when actual or moral fraud as distinguished from constructive fraud is charged.

We are aware that in Earle v. Chace, 12 R. I. 374, and in Providence Association v. Citizens Savings Bank, 19 R. I. 142, the court after finding that the bill might be dismissed for failure to prove allegations of actual fraud stated that as the case had been presented on other grounds the court would

consider such other grounds. After considering the evidence and such allegations of the bill as did not charge actual fraud the court found that the complainant had failed

to present a case which would have entitled him to relief if he had not made the mistake of charging actual fraud which he could not establish. At the time these cases were heard there was no appeal in equity causes. When Earle v. Chace was considered bills in equity were heard on the merits by the Supreme Court sitting in banc. When Providence Association v. Citizens Savings Bank was before the court bills in equity were heard on the merits by the Appellate Division of the Supreme Court. In each of the two cases next above mentioned the court stated that the bill might be dismissed for failure to prove allegations of fraud; but inasmuch as the case had been presented on all grounds and as the court had all of the evidence before them, said court, having both original and final jurisdiction of the subject matter, did express an opinion on the merits of the case, regardless of the failure to substantiate the charge of actual fraud, apparently for the purpose of advising the parties that it would be useless for the complainant to bring a new bill; but the procedure adopted in these two cases was a departure from the established practice. See Mt. Vernon Bank v. Stone, supra; Tillinghast v. Champlin, supra. The (1) rule is now settled that when a bill charges actual fraud, no matter what other allegations the bill may contain, the complainant stands or falls upon that charge alone as no other issue is before the court. See Schuyler v. Stephens, supra: Gilbane v. Union Trust Co. supra. The decree appealed from is modified by striking out the second clause thereof and inserting in the fourth clause after the word "dismissed" the words "without prejudice except as to the question of actual fraud." In all other respects said decree is affirmed.

The cause is remanded to the Superior Court with direction to enter a decree in accordance with this opinion.

George H. Raymond, for complainant.

James Harris, John C. Knowles, for respondent.

MORRIS F. CONANT vs. FURNACE IMPROVEMENT COMPANY.

JANUARY 6, 1922.

PRESENT: Sweetland, C. J., Vincent, Stearns, Rathbun, and Sweeney, JJ.

(1) Direction of Verdict. Conflicting Evidence.

Where the evidence on an issue of fact is conflicting and a jury might find in favor of either party as they believed the testimony it is error to direct a verdict, for the question of the credibility of witnesses is in the first instance for the jury.

Assumpsit. Heard on exception of defendant and sustained.

RATHBUN, J. The declaration in this case contains a single count in *indebitatus assumpsit*. The case is before this court on the defendant's exception to the action of the trial justice in the Superior Court in directing a verdict for the plaintiff.

The plaintiff was a representative of the Pilgrim Machine Company, a corporation operating a machine shop. soliciting business for his company the plaintiff met the officers of the defendant company, a corporation organized for the purpose of manufacturing and selling a patented article called a combustionizer, designed to eliminate smoke and increase combustion in furnaces attached to steam The latter corporation was in need of capital and also of the services of a machine shop to manufacture said patented article. It appears that the plaintiff could secure for his company the work of manufacturing combustionizers for the defendant company provided the plaintiff or his company invested \$2,500 in the preferred stock of the defendant company. The plaintiff in accordance with some agreement between himself and defendant mailed to the defendant a check for \$500. No letter accompanied the check. The defendant's treasurer on receipt of said check mailed to the plaintiff a receipt stating that \$500 had been received on account of a subscription of \$2,500 for preferred stock of the defendant company. Upon receiving said receipt the plaintiff wrote the defendant, as follows:

"Dear Mr. Casey:

I am in receipt of yours of the 1st constituting a receipt for my check. My understanding with Mr. Shedd and Mr. Puddington was that my deposit of \$500 was to be simply evidence of good faith on my part until the Pilgrim Machine Co. could manufacture six or a dozen machines and see if the job was satisfactory to Mr. Puddington and the question of price satisfactory to us both. After we had manufactured the sample lot of machines if our work is satisfactory and the price is agreed upon by both of us I was to subscribe to \$2,500 of preferred stock. If there was any dissatisfaction with our class of workmanship from your standpoint or we found some detail of manufacture that would make the machine impractical for us to make, I was to have the privilege of deciding whether I would make an investment in your company or whether I would request payment of the sum of my deposit.

In view of the fact that your receipt reads quite differently from the above I would appreciate confirmation of this understanding with Mr. Shedd and Mr. Puddington.

Sincerely yours,

MORRIS F. CONANT."

The officers of the defendant company testified that, as an inducement to the plaintiff to agree to subscribe for twenty-five shares of preferred stock of the defendant company, at \$100 per share, they offered to give the plaintiff's company a contract to manufacture all combustionizers sold by the defendant for a period of one year; that the price to be paid was to be the cost of manufacturing plus a reasonable profit; that the plaintiff was to determine the actual price to be paid (i. e., cost plus a reasonable profit) after manu-

facturing six combustionizers; that the plaintiff accepted this offer on the condition that he found that his company had the ability to manufacture the combustionizers; that the plaintiff reported that his company could build the combustionizers and paid \$500 which he is now seeking to recover, as a part payment for said stock in accordance with his agreement, and that later the plaintiff refused to pay the balance of \$2,000 for said twenty-five shares of stock and also failed to manufacture any of the sample combustionizers.

The plaintiff testified substantially in accordance with his contentions as set forth in his letter in which he objected to the terms of said receipt for \$500. He also testified that the defendant's officers, after the dispute arose concerning the terms of said receipt, promised to repay \$500 to the plaintiff. Each of the defendant's officers denied that he had promised to return money to the plaintiff.

A reading of the transcript discloses that the evidence

presented the following issues of fact: Did the parties enter into an agreement whereby the plaintiff agreed unconditionally to invest \$2,500 in the preferred stock of the defendant company and did plaintiff send said check for \$500 as a part payment for stock in accordance with such an agreement, or, did the plaintiff promise to invest \$2,500 in said stock only in the event of his obtaining a contract to manufacture combustionizers, after satisfying himself that his company could do the work, and did the plaintiff make the payment of \$500 as a deposit in evidence of good faith in accordance with an agreement that the money would be returned should the parties fail to enter into an agreement for the manufacture of combustionizers; did the defendant after receiving said check for \$500 promise to repay \$500 to the plaintiff?

The evidence was conflicting upon each of these issues. There was testimony from which the jury might have found that the plaintiff agreed unconditionally to invest \$2,500 in the preferred stock of the defendant company and that said check was sent as a part payment in accordance with this agreement; also, that the defendant did not agree to repay

\$500 to the plaintiff. Consequently it was error to direct a verdict for the plaintiff. The rule was very clearly stated by Mr. Justice Sweetland in Reddington v. Getchell, 40 R. I. at 468, as follows: "The question, however, as to the credibility of witnesses is in the first instance for the jury and not for the judge presiding: nor is the justice warranted in directing a verdict in accordance with what he thinks is the preponderance of the evidence. Upon motion for a new trial made by a party who is dissatisfied with the verdict rendered by a jury, a justice who presided at the trial is justified in considering, and it is his duty to consider, the credibility of witnesses and what, in his view, is the preponderance of the evidence; if he believes the verdict to be unjust he should set it aside and grant a new trial; he should not, however, direct a verdict upon such grounds, but only upon the ground that there is no legal evidence which would justify a contrary verdict. Under our constitution and laws when the testimony is conflicting the questions of the credibility of witnesses and the preponderance of evidence must in the first instance be determined by a jury; as also they must be finally determined by a jury. Carr v. American Locomotive Co., 31 R. I. 234." See also Gilbane v. Lent, 41 R. I. 462; Dawley v. Congdon, 42 R. I. 64.

The defendant's exception is sustained and the case is remitted to the Superior Court for a new trial.

Green, Hinckley & Allen, Harold R. Semple, Frederick W. Tillinghast, for plaintiff.

McGovern & Slattery, John H. Slattery, for defendant.

In re Estate of John W. Rathbun.

JANUARY 19, 1922.

PRESENT: Sweetland, C. J., Vincent, Stearns, Rathbun, and Sweeney, JJ.

(1) Guardian and Ward. Counsel Fees. Resignation of Guardian.

There is no authority under Gen. Laws, cap. 321, § 12, for the allowance of counsel fees, to be paid by a guardian of a person of full age, out of the

estate of the ward, for services in connection with a petition for leave to resign as guardian.

- (2) Guardian and Ward. Counsel Fees. Release from Guardianship.
- There is no authority for the allowance of counsel fees and expenses of experts under Gen. Laws, cap. 321, § 12, to be paid by a guardian of a person of full age, out of the estate of the ward, on a petition of the ward for release from guardianship.
- (3) Guardian and Ward. Appointment of New Guardian. Counsel Fees.
 Where the original guardian resigned and a petition was filed for the appointment of a new guardian, counsel fees for services rendered the ward in defending against the new appointment are within the provisions of Gen. Laws, cap. 321, § 12, it appearing that the ward was possessed of some mental capacity, and was entitled to have his wishes and interests considered in the appointment.

PROBATE APPEAL. Heard on exception of petitioners and sustained.

SWEETLAND, C. J. This is an appeal from a decree of the Probate Court of Coventry denying the petition of Alberic A. Archambault and Raoul Archambault, associated in the practice of law under the style of Archambault and Archambault. In this petition they pray that an allowance out of the estate of John W. Rathbun be made to them for professional services rendered to the said John W. Rathbun and for money expended by them in his behalf.

The appeal was heard before a justice of the Superior Court sitting without a jury and said justice rendered a decision sustaining the decree of the probate court. The cause is before us upon the petitioners' exception to said decision.

It appears that John W. Rathbun, of full age, was on April 6, 1918, adjudged by said Probate Court of Coventry to be a person of unsound mind and one who, from want of discretion in managing his estate, so spends, wastes and lessens his estate that he may bring himself and his family to want and suffering and may render himself and family chargeable upon the town for support; and on said day his son Ralph Rathbun was appointed guardian of his person and estate.

At some time prior to July 14, 1919, said Ralph Rathbun filed in said probate court his petition asking for leave to resign as such guardian, which petition was not heard by the probate court, but on July 14, 1919, was withdrawn by the petitioner. At some time prior to November 10. 1919, Ralph Rathbun again filed in said probate court a petition asking for leave to resign as such guardian and for the appointment in his stead of his sister, Leila A. Rathbun. a daughter of said John W. Rathbun. On November 10, 1919, in said probate court the petition was granted and said Leila A. Rathbun was appointed guardian of the person and estate of John W. Rathbun. On November 6, 1919, said John W. Rathbun by his next friend filed his petition in said probate court asking that he be discharged from guardianship over his person and estate, on the ground that he was capable of managing his own estate and that such guardianship was no longer necessary. On December 8, 1919, this petition of John W. Rathbun was denied by said court.

The appellants claim that through Alberic A. Archambault. Esq., they acted as attorney for John W. Rathbun before said probate court in the last three proceedings mentioned above, i. e., in the first petition of Ralph Rathbun for leave to resign; in the petition for the appointment of Leila A. Rathbun and in the petition of said John W. Rathbun for a discontinuance of the guardianship. appellants petitioned the probate court to make them an allowance out of the estate of John W. Rathbun for their services and for money expended by them, the same to be paid them by his guardian, as follows: fifty dollars for their services in each of said petitions and one hundred and fifty dollars for the cost of the services of four physicians employed by them as experts in connection with the petition of said John W. Rathbun asking that he be discharged from guardianship.

The appellants base their request for an allowance upon the provisions of Section 12, Chapter 321, General Laws, 1909. Section 7 of said Chapter 321 gives to probate courts jurisdiction to appoint a guardian over persons of full age for the reasons stated in said Section 7. Section 12, Chapter 321, is as follows: "Sec. 12. If a guardian is appointed for any person liable to be put under guardianship under the provisions of section seven, the court shall make an allowance, to be paid by the guardian, for all reasonable expenses incurred in prosecuting or in defending against the petition."

Said justice refused to disturb the decree of the probate court on the ground that said Section 12 does not authorize an allowance from the estate of the ward on account of any item in the appellants' claim.

In order that the appellants may avail themselves of said Section 12 and thus obtain the payment of their claim through the immediate order and decree of the probate court it must appear that the substance of their claim comes within the purview of that section. The probate court must find that the charges for professional services and for money

expended for the benefit of the ward are fairly within the designation of reasonable expenses incurred in defending against a petition for the appointment of a guardian for this person of full age. The appellants' services in connection with the petition of Ralph Rathbun for leave to resign as guardian clearly were not rendered in connection with the (1) defence of a petition for the appointment of a guardian, nor were the services rendered and the money expended by the appellants in connection with the petition of the ward to be released from guardianship. As to those items of the appellants' claim, if they are recoverable at all, recovery must be sought in some proceeding other than by direct application to the probate court for an allowance under the

The appellants' claim for services in connection with the appointment of Leila A. Rathbun as guardian appears to us to stand in a different situation with relation to the statute. If said section be given a liberal construction this item may fairly be said to come within its remedial provisions. If the appellants establish that they rendered services in that

provisions of said Section 12.

proceeding then fair compensation for such services would be included in the reasonable expenses incurred in defending against the petition for the appointment of Miss Rathbun. The guardian contends that the appointment of a guardian referred to in Section 12 is restricted to the original appointment and that it is only for expenses incurred in defending against the original petition that the probate court may make an allowance under this section of the statute. Before (2) taking action upon the petition for the appointment of Miss Rathbun the probate court was required by statute to serve notice of the petition upon the intended ward, John W. Rathbun, in person, at least fourteen days before such action. This notice was given that he might appear in person and be heard upon the petition or that he might have counsel to represent him and protect his interests. It is true that the question of the necessity for guardianship had been determined in the original petition but if a new guardian was tobe appointed in place of the son Ralph, the ward was entitled to have his wishes and his interests considered in the selection of a successor. It appears from the evidence that in the original petition the probate court adjudged that John W. Rathbun was of unsound mind and also that he was a spendthrift. Whether each ground for the application weighed equally with the probate court in its finding we are unaware, but it does appear that at about the time of the appointment of Miss Rathbun, the ward, according to the testimony of certain medical witnesses, was of sound mind and capable of managing his own affairs. Although this opinion was contrary to that of certain other medical witnesses we are justified in the conclusion that John W. Rathbun was possessed of a certain mental capacity and it would be reasonable under the facts before us to permit Mr. Rathbun to appear in his own proper person at the hearing upon the petition to appoint his daughter as his This is in accord with the practice permitted in Pratt v. Court of Probate of Pawtucket, 22 R. I. 596; Bennett v. Randall, 28 R. I. 360 and Brown v. Probate Court of Warwick, 28 R. I. 370, which practice has been approved in Champlin v. Probate Court of Exeter, 37 R. I. 349. Mr. Rathbun should also be permitted to obtain the assistance of counsel at such hearing and fair compensation for the services of such counsel would be included in the reasonable expenses of defending against said petition.

We are of the opinion that the justice of the Superior Court was in error in holding that said Section 12 was without application to the appellants' claim for services rendered in connection with the petition for the appointment of the present guardian, Leila A. Rathbun.

The appellants' exception is sustained. The case is remitted to the Superior Court for a new trial. At such new trial, if it shall be found that the appellants performed services in behalf of John W. Rathbun in connection with the application for the appointment of his present guardian, then the Superior Court should make such an allowance as shall seem to it to be a reasonable compensation for such services, to be paid by the guardian.

Archambault & Archambault, Joshua Bell, for appellants. Albert B. West, for appellee.

John Sears vs. A. Bernardo & Sons.

JANUARY 6, 1922.

PRESENT: Sweetland, C. J., Vincent, Stearns, Rathbun, and Sweeney, JJ.

- (1) Automobiles. Negligence. Violation of Ordinance. One-way Street.
- The fact that defendant's automobile proceeded along a one-way street in the direction prohibited by ordinance is a fact for the jury to consider in connection with all other facts bearing upon the question of defendant's negligence, and it was error to charge as a matter of law that the violation of the ordinance constituted negligence.
- (2) Trial. Requests to Charge.
- The rules of the superior court do not require that requests to charge be submitted before arguments to the jury, and the court should have received and ruled upon requests presented after the conclusion of the arguments.

(3) Automobiles. Negligence.

In a personal injury action request to charge that if plaintiff while approaching the intersection of streets where the accident occurred, was driving his machine at an unreasonable rate of speed, which speed contributed to the accident, he could not recover even though the defendant was guilty of negligence, was proper.

(4) Automobiles. Negligence.

In a personal injury action request to charge that driving a car the wrong way on a one-way street does not make the driver liable for all accidents that may occur, was proper.

TRESPASS ON THE CASE for negligence. Heard on excepceptions of defendants and sustained.

RATHBUN, J. This is an action of trespass on the case for negligence brought to recover for personal injuries suffered by the plaintiff and for damages to his automobile caused by a collision between an automobile owned and operated by the plaintiff and a truck owned by the defendants as copartners and operated by one of the partners. The trial in the Superior Court resulted in a verdict for the plaintiff for four hundred dollars. The case is before this court on defendants' exceptions: to the admission of testimony; to portions of the charge to the jury; to the refusal to charge as requested and to the refusal of the trial court to grant a new trial.

The collision occurred at the intersection of College and South Main streets in the city of Providence, when the plaintiff's automobile was proceeding in an easterly direction and the defendants' truck in a northerly direction. The portion of South Main street from which the truck emerged immediately before the accident was a one-way street and the truck was driven out of South Main street in the direction forbidden by the city ordinance.

The fifteenth exception is to the following instruction to the jury: "It is charged that the defendant was guilty of negligence in that he used a one-way street in violation of law. Of course if he violated the ordinance of the City of Providence and used a one-way street to that extent, he (1) was guilty of negligence." Whether the defendant was guilty of negligence was a question of fact to be determined by the jury. The fact that the defendants' truck proceeded along a one-way street in the direction prohibited by the ordinance is a fact for the jury to consider in connection with all other facts bearing upon the question of whether the defendants were guilty of negligence, but it was error to charge as a matter of law that the violation of the city ordinance constituted negligence. Oates v. Union R. R. Co., 27 R. I. 499. The fifteenth exception is sustained.

The defendants took twenty exceptions to the refusal of the court to instruct the jury as requested. It appears that the court adjourned to the following morning immediately after arguments to the jury were concluded and that on the following morning before the court convened the defendants' attorney tendered to the trial justice twenty written requests for instructions to the jury. Said justice, being of the opinion that the rules of the Superior Court require that requests for instructions be presented before arguments are addressed to the jury, refused to accept or examine said requests for instructions. The rules of the Superior Court

requests for instructions. The rules of the Superior Court require that requests for instructions be submitted in writing but said rules do not require that such requests be submitted before arguments are addressed to the jury. It may be appropriate to state that a proper effort to prevent delay in the administration of justice, as well as due courtesy to the court, requires that requests for instructions be presented as soon as the reasonable convenience of counsel permits. We think it was the duty of said justice to receive and rule upon the defendants' requests for instructions.

The twenty-third exception is to the refusal to instruct the jury in accordance with the seventh request, as follows: "If the plaintiff, while approaching the intersection of the streets where the accident occurred was driving his machine at an unreasonable rate of speed, which speed contributed to the accident, he can not recover even though the defend-

(3) to the accident, he can not recover even though the defendant was guilty of negligence." The correctness of this proposition can not be denied and the rule is too elementary to require discussion.

The twenty-fourth exception is to the refusal to instruct the jury in accordance with defendants' eighth request, as follows: "Driving a car the wrong way on a one-way street does not make the driver liable for all accidents that may (4) occur." The discussion of the fifteenth exception is applicable to this request. It was error to deny the defendants' eighth request.

The twenty-third and twenty-fourth exceptions are sustained.

It appears that at least two of defendants' requests for instructions should have been granted and as said justice did not rule specifically upon each of the defendants' twenty requests for instructions and as we can not infer that he would not have ruled correctly in each instance had he examined said requests we do not consider the exceptions taken to the refusal to charge as requested in the remaining eighteen requests for instructions.

The case is remitted to the Superior Court for a new trial.

Christopher J. Brennan, for plaintiff. Ernest P. B. Atwood, for defendant.

MARIA FELICIA CIACCIA vs. THE GENERAL FIRE EXTINGUISHER Co.

FEBRUARY 3, 1922.

PRESENT: Sweetland, C. J., Vincent, Stearns, Rathbun, and Sweeney, JJ.

- (1) Workmen's Compensation Act. Parties. Commutation.
- On petition of a widow for commutation of weekly payments under the Workmen's Compensation Act, the minor children of deceased must be joined as parties.
- (2) Workmen's Compensation Act. Commutation. Appeal.
- Where the record shows no evidence on a ground alleged for commutation of weekly payments under the Workmen's Compensation Act, such claim will not be considered on appeal.

Petition under Workmen's Compensation Act. Heard

on appeal of petitioner and dismissed.

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VINCENT, J. This is an appeal by Maria Felicia Ciaccia from a decree of the Superior Court denying her petition for a commutation of the future payments which would become due to her under the Workmen's Compensation Act.

On November 6, 1920, the husband of Maria sustained injuries in the course of his employment by the respondent Fire Extinguisher Co. which, a few days later, resulted in his death. He left a widow and two minor children.

On December 31, 1920, an agreement was entered into which was duly filed in, and approved by, the Superior Court which provided for the payment to the petitioner, as the widow of the deceased, the sum of ten dollars per week for a period of three hundred weeks

On June 18, 1921, said payments having been made for a period of more than twenty-six weeks, the said Maria filed her petition in the Superior Court praying that the future weekly payments be commuted.

On June 29, 1921, this petition was heard in the Superior Court and on September 14, 1921, the same was denied and the following decree entered. "(1) It appears that the petitioner is the mother of two minor children, Fillipo and Cosimo, aged 14 and 12 respectively; that no provision is made in said petition for the protection of the interests of said minor children in said future compensation payments should the petitioner predecease said children within the time of the remaining compensation period. (2) That commutation of future payments is not for the best interests of the petitioner."

From this decree the petitioner has appealed to this court, setting forth in her reasons of appeal that the findings of the Superior Court, as expressed in its decree, are erroneous and against the law.

At the hearing in the Superior Court it was claimed by the Fire Extinguisher Co. that the minor children of the de-

ceased employee should be made parties to the petition, either as petitioners or respondents, on the ground that their possible rights and interests in future payments were necessarily involved; and that the employer and insurer were entitled to protection against their future claims in case the widow should die within the compensation period.

(1) We think that the children were necessary parties to the proceeding. If the widow should not live through the compensation period, the children, upon her death, would become entitled to the compensation, thereafter payable, for their own use under Section 6, Article II of the act. These rights of the children are contingent but they are nevertheless legal rights which must be considered. These rights cannot be extinguished unless the children are made parties and are before the court.

The employer is also entitled to protection. If the children are not parties to the petition, any decree entered thereon commuting future payments would not bind them. Upon the death of the petitioner within the compensation period, the children could, under the plain terms of the statute, legally call upon the employer to make payments to them thereafter for the portion of the three hundred weeks then remaining.

The petitioner further contends that she is entitled to have a commutation of future payments on the ground that she is about to remove from the United States and take up her residence in Italy.

There is nothing before us to show that any evidence was presented to the Superior Court to the effect that the petitioner was about to remove from the United States and we see no occasion for any consideration of that feature of the petitioner's claim.

The appeal of the petitioner is dismissed, the decree of the Superior Court is affirmed, and the cause is remanded to said court for further proceedings.

William A. Gunning, for petitioner. Ralph T. Barnefield, for respondent.

DELIA GINGRAS vs. CHARLES E. LINSCOTT.

MARCH 8, 1922.

PRESENT: Sweetland, C. J., Vincent, Stearns, Rathbun, and Sweeney, JJ.

(1) Executions. Payment of Board of Prisoner.

Gen. Laws, cap. 325, § 1 as amended, does not prescribe either the mode or medium of payment of the board of defendants committed on execution to jail, and the acceptance of a valid money order by the keeper of the jail before the prisoner's board was due, was a payment within the meaning of the statute.

HABEAS CORPUS. Heard on petition for writ and denied.

STEARNS, J. The petitioner, Delia Gingras, was committed to the Providence County Jail in Cranston on January 9, 1922, by virtue of an execution issued by the Superior Court on a judgment in an action of trespass on the case for slander. The respondent is the keeper of the County Jail.

At the time of the commitment the prisoner's board for one week was paid in cash in advance by the committing officer to the respondent. On January 12, the respondent received by mail from the committing creditor a United States postal money order for four dollars, the amount of the prisoner's board for one week, which was made payable to the order of respondent at the local post office in Cranston. This money order was at once endorsed by respondent. The clerk in the office of the jail, on the same day and in pursuance of the practice of the office, drew four dollars in cash from a certain separate fund kept in the office, called the "Tobacco Fund," placed the postal money order in the fund and the cash thus withdrawn was then applied and credited to the board of the prisoner for the following week. The local postmaster in Cranston also kept a store and supplied therefrom various articles for the County Jail. The practice at the jail was to use such money orders as were on hand at the jail, in payment of the bill for supplies, which was usually presented weekly by the postmaster. The money order in this case was received by the postmaster in part payment of his bill, some two or three days after the beginning of petitioner's second week of confinement. Petitioner claims that the committing creditor has not paid or caused to be paid from and after January 16 in advance the board of petitioner, and that petitioner is illegally detained at jail and is now entitled to be discharged from custody.

The proceeding is by petition for a writ of habeas corpus. ·Chapter 325, Section 1, General Laws, provides that whenever any person shall be imprisoned upon execution in any action whatsoever "the party at whose suit such person is imprisoned shall pay to the keeper of the jail in which he is imprisoned the sum of three dollars per week in advance for the board of such prisoner." The amount paid by the creditor for the board of the prisoner is to be added to and is made a part of the costs of commitment and detention to be paid by the prisoner. (Sec. 3) By Chapter 1649. Sec. 16, Public Laws 1917-1918, in amendment of Chapter 364, Section 16, the fees allowed to jailers for the board of prisoners confined in civil cases on civil process in Providence County Jail are raised to four dollars a week. The effect of this latter enactment, although no reference is made therein to Chapter 325, is to amend Chapter 325 and to require the prepayment of four dollars a week.

The question is, has legal payment been made in this case? If the creditor wishes to confine the debtor in cases where the right to do so is given by the statute, he must pay for the debtor's board and to prevent any chance of loss by the State, the payment must be made in advance. The question in regard to the rights of the keeper to require payment to be made in a particular manner is not in issue. The keeper cannot give credit to the committing creditor, but neither the mode nor the medium of payment is prescribed by the statute. Payment by legal tender is not required. Payment and acceptance of money which is current in the community and generally used in business transactions would undoubtedly be good. A post office

money order is a method provided by the Federal government to insure greater security in the transmission of money. It is in common and daily use in business transactions and is particularly useful in the transmission of small amounts of money. By accepting the order and cashing the same from the tobacco fund, we think the payment was complete and can fairly be held to be a payment in money. But even if this had not been done we think the acceptance of a valid money order by respondent before the prisoner's board was due was a payment within the meaning of the statute. The State was protected from loss. By his acts in buying the money order and sending the same to the respondent, the creditor had parted with all right to control the payment of the money. The order to pay was not subject to any conditions nor was there any question that the payee could collect the cash whenever he desired. The acceptance of the order by respondent made the transaction complete and constituted payment.

The petition for writ of habeas corpus is denied.

Cooney & Cooney, for petitioner.

Thomas P. Corcoran, for respondent.

CRYSTAL SPRING CO. vs. CARRIE CORNELL.

MARCH 8, 1922.

PRESENT: Sweetland, C. J., Vincent, Stearns, Rathbun, and Sweeney, JJ.

(1) Automobiles. Negligence.

The driver of an automobile attempting to pass another car in front of him is bound to exercise a high degree of care and to see that the situation is such that he can safely do so. He should observe not only the space which he is intending to traverse but also the opportunities which an approaching car would have to pass him safely. If the conditions of the roadway are such as would limit the movement of the approaching car they should be observed by him, and under such conditions if he could not pass or continue on with safety it is incumbent upon him to either stop or drop back.

Trespass on the Case for negligence. Heard on exceptions of plaintiff and overruled.

VINCENT, J. This is an action of trespass on the case for negligence brought by the Crystal Spring Company, a corporation organized under the laws of Rhode Island and located and doing business at Seekonk in the Commonwealth of Massachusetts, against Carrie Cornell, of Barrington, in the State of Rhode Island, to recover damages arising from a collision between a truck belonging to the plaintiff corporation and the touring car of the defendant.

The case was tried in the Superior Court before a justice thereof sitting with a jury. A verdict was rendered for the defendant and later the motion of the plaintiff for a new trial was denied by the trial justice.

The case is now before us upon the exceptions of the plaintiff to certain portions of the charge; to the refusal of certain requests to charge; and the denial of the motion for a new trial.

At the trial in the Superior Court the plaintiff produced but one witness, Robert S. Brown, who was practically the sole owner of the plaintiff corporation. He testified that on the afternoon of the day of the accident he was driving his truck in a northerly direction on Pawtucket avenue, East Providence; that he overtook and attempted to pass another truck going in the same direction; that upon giving the usual signal the truck in front of him pulled to its right upon the tar construction which was, at that point, about fifteen or sixteen feet wide; that outside of the tar construction on each side of the road were car tracks; that he pulled out to his left and was alongside the truck, which he was attempting to pass, when the defendant's automobile appeared from around a curve about two hundred yards away; and that it was then obvious to him that there was not sufficient time in which to pass the truck and so he continued on beside it, trusting that the defendant would bear more to the right and give him ample room. He does not claim that he made any attempt to stop his truck but says that he slackened his speed "watching to see what the other fellow would do."

He admits that he could have stopped within fifty feet and that he could have dropped behind the truck which he was attempting to pass, but that he kept on well over the center of the tar construction and that he was slowed down to about five miles an hour when the two cars came in collision and that the defendant's car was at that time going about the same speed.

He further testified that the defendant's car was traveling on its right-hand side of the road on the tar construction and that it remained on the tar construction until the time of the accident.

The plaintiff claims that the defendant's car should have been driven further to its right upon or over the street car tracks and that if this had been done there would have been sufficient room for the two trucks, going in one direction, and the defendant's car, going in the other, to have passed abreast.

Brown's truck had been proceeding behind four other cars. The defendant's driver says that he slowed down to about ten miles an hour when he saw the string of cars which he was approaching; that Brown's truck swung from behind these cars over to the left side of the road in front of him; that at that time the two cars were not more than fifty feet apart; that he did everything possible to stop his car and although he reduced its speed to less than five miles an hour he was not able to avoid the collision; that he was not able to turn further to the right on account of the broken edge of the tar construction and also for the reason that outside of the tar construction the earth had been washed out forming a gutter so that the rail stuck up some four or five inches; and that any attempt to pass over it might have resulted in overturning his car.

It is undisputed that the cars came together head-on. The testimony of the driver was to some extent corroborated by the testimony of the two ladies who were in the automobile.

Upon this testimony the question of the defendant's negligence and the plaintiff's contributory negligence was left to the jury.

A person attempting to pass a car in front of him is bound (1) to exercise a high degree of care and to see that the situation is such that he can safely do so. He should observe not only the space which he is intending to traverse but also the opportunities which an approaching car would have to pass him safely. If the condition of the edge of the tar construction or the unusual prominence of the rails of the car tracks were such as would limit the movement of the approaching car, they should have been observed by him. He should have known and appreciated the limitations of the approaching car and, if he found his surroundings were such that he could not pass or continue on with safety, it was incumbent upon him to either stop his car or drop back to the position which he had formerly occupied in rear of the other truck.

The jury rendered a verdict in favor of the defendant. We think that upon the testimony they might reasonably reach the conclusion that the defendant was not negligent and that the accident was due to the improper operation of the plaintiff's truck, taking into consideration the condition of the roadway and the presence of the car tracks.

We do not find any merit in the exceptions of the plaintiff regarding the charge of the court and its refusals to charge. The matters contained in the plaintiff's requests had already been substantially covered by the charge of the court.

The plaintiff's exceptions are all overruled and the case is remitted to the Superior Court with direction to enter judgment for the defendant upon the verdict.

William J. Brown, for plaintiff.

Greenough, Easton & Cross, for defendant.

CHARLES E. ANDREWS et al. vs. R. I. HOSPITAL TRUST Co. et al.

JONATHAN ANDREWS vs. R. I. HOSPITAL TRUST Co. et al.

MARCH 10, 1922.

PRESENT: Sweetland, C. J., Vincent, Stearns, and Rathbun, JJ.

(1) Jurors.

Where it does not appear that a party was in any way prejudiced by the manner in which the jury list was made up, a motion to quash the list was properly overruled, for a party cannot demand that a juror shall be a resident of any particular city or town of the county, for if he receives an impartial trial, that is all he can require.

(2) Wills. Evidence.

On a probate appeal, evidence that the parents of testatrix were interested in a charity, to which testatrix gave a large bequest, was properly admitted as furnishing some reason for her own bequest.

PROBATE APPEAL. Heard on exceptions of appellants and overruled.

SWEETLAND, C. J. The above entitled causes are appeals from a decree of the Probate Court of North Smithfield admitting to probate certain instruments as the last will and testament and two codicils thereto of Dency A. Wilbur, late of North Smithfield, deceased.

The appeals were consolidated and tried in the Superior Court before Mr. Justice Brown sitting with a jury and resulted in a verdict sustaining said instruments as the last will and codicils of the testatrix. The appellants duly filed their motions for a new trial which were denied by said justice. The causes are before us upon the appellants' exceptions to the decision of said justice upon the motions for new trial and upon exceptions to certain rulings of said justice made in the course of the trial.

Said appeals were placed upon the list of those causes in the Superior Court, sitting for the counties of Providence and Bristol, which were to be tried in the city of Woonsocket. At the opening of the trial of said causes and before the drawing of jurors the appellants moved to quash the list of jurors summoned for service at the trial, on the ground

that they had not been selected legally. This motion was denied. The appellants now urge their exceptions to the ruling of said justice. It appears that on Thursday, May 20, 1920, said justice set down these appeals for trial on Monday, May 24, 1920, and that late in the afternoon of said Thursday the jury commissioner received an order from the Superior Court to summon a list of forty jurors from which the panel for this trial was to be drawn. The jury commissioner for valid practical reasons summoned forty jurors from the cities of Providence, Pawtucket and Central Falls and none from the other cities and towns of the counties of Providence and Bristol. Ordinarily, when the time within which the summons for jurors must be served permitted, the jury commissioner was accustomed to summons jurors to serve at Woonsocket from more of the cities and towns of said counties than he did in this instance, but never from all. The ordinary practice of the jury commissioner in this regard tended to equalize the burden of jury duty among the cities and towns and was a reasonable performance of his duty: but it was not required by any (1) provision of the statute. When, as in this case, the necessities of the situation required him to depart from his usual custom, such departure did not render the jury list invalid, provided a fair and impartial jury might be obtained The appellants do not claim that the jury impaneled to try their appeals was not fair and impartial and it does not appear that the appellants were prejudiced in any way by the manner in which said jury list was made up. It has been held by this court that "a party has no vested interest in the selection of a particular juror," nor can he demand that a juror shall be a resident of any particular city or town of the county, for if he receives an impartial trial that is all he can require and with that he must be content. McHugh v. R. I. Co., 29 R. I. 206; Stevens v. Union R. R. Co., 26 R. I. 90; Fiske v. Paine, 18 R. I. 632; Shepard v. N. Y., N. H. & H. R. R. Co., 27 R. I. 135; State v. Fidler, 23 R. I. 41. This exception of the appellants should not be sustained.

The appellants' exceptions to the denial of their motions for new trial should be overruled. The appellants' reasons of appeal are based upon their claims that the testatrix was induced to execute said will and codicils through fraud practiced upon her by one George W. Lothrop and by undue influence exercised upon her mind by said Lothrop. appeared in evidence that Miss Wilbur never married; that after the death of her parents she and her unmarried sister Hannah lived together in the family homestead until the death of Hannah in 1909 and from that time until her own death in 1919 the testatrix continued to live in the homestead unaccompanied by any member of her family: that she had no relatives except distant cousins, with most of whom her association was not intimate; that said George W. Lothrop and his family had been near neighbors of the testatrix and her sister for very many years and that relation continued down to the death of the testatrix. diary of the testatrix, kept by her with regularity for many years, was in evidence and it shows that during a period from long prior to the execution of the will in 1909 and continuing to the year of her death the testatrix entertained feelings of friendship amounting to sincere affection for the members of the Lothrop family. The evidence warrants the statement of Mr. Justice Brown in his decision upon the motions for new trial that. "It is difficult to conceive of more intimate relations existing between two families who are not blood relatives." From the evidence the jury might find that Miss Wilbur before and at the time of the execution of said will and codicils was a woman of high character and very gentle nature, kindly and considerate towards others, but with a vigorous mentality and will, having business capacity and executive ability; that she was particularly interested in certain religious and charitable institutions and activities and that she took an active part in their management. Her estate amounted to between two hundred and twenty-five and two hundred and fifty thousand dollars. By the instrument purporting to be Miss Wilbur's last will and the codicils thereto she gave the great bulk of her property to various charities and, in addition to some bequests to her relatives, she gave Mr. Lothrop and his wife her homestead estate and the sum of ten thousand dollars each, and to their three daughters the sum of five thousand dollars each. From the evidence the jury might reasonably find that. although the testatrix consulted Mr. Lothrop upon business and other matters and had respect for and was influenced by his judgment and advice, such influence fell far short of coercion or restraint destroying her free agency. Said justice very carefully instructed the jury upon the law relating to the issues raised by the appellants' claims of fraud and undue influence. The jury's verdict that said instrument represented the free will of Miss Wilbur, supported by the approval of said justice, will not be disturbed by us. Wethink said justice was warranted in holding with reference to the appellants' claims that "acting upon the evidence the jury could not well have reached a finding sustaining such contention."

The appellants excepted to the rulings of said justice permitting the proponents of the will to introduce evidence that the father and mother of Miss Wilbur were interested in the work of the Woonsocket Hospital, to which institution a large bequest was made in the will of Miss Wilbur, and also evidence that her father had made gifts to the hospital during his life. The introduction of this testimony was proper as furnishing some reason for her own bequest although there was abundant testimony that Miss Wilbur herself was deeply interested in the service of this charity.

The appellants also insist upon their exceptions to the following rulings of said justice refusing to admit certain testimony offered by the appellants. He rejected testimony as to who had charge of the funeral arrangements of Miss Wilbur's father in 1889, as to whether Mr. Lothrop had influence over Hannah, the sister of the testatrix, who died in 1909, as to who had charge of the arrangements for the

funeral of Miss Wilbur; and said justice ruled out the following question asked of the witness Mrs. Slocum, a neighbor of the testatrix, "Which of the two, Mr. Lothrop or Miss Wilbur, had the ability to control the other by will power?" These rulings of said justice are without error.

The appellants sought to develop before the jury their theory as to a compelling power which Mr. Lothrop had acquired over the mind and will of Miss Wilbur, destroying her free agency and forcing her to execute these instruments in accordance with his wish. This theory was as follows: that Mr. Lothrop had carried on an improper intimacy with Hannah, the sister of the testatrix, that this became known to the testatrix and thereby through fear of his disclosure of such intimacy Lothrop had acquired a sinister power over the testatrix which he exercised to force the making of these instruments. The appellants were permitted to introduce certain testimony as to the relations of Lothrop and Hannah, from which the appellants sought to have inferences drawn in support of their theory. Most of this testimony, if true, is consistent with an innocent relation existing between friendly neighbors. The jury might well have found that no impropriety had taken place and further that whatever had been the nature of these relations they were unknown to the testatrix and in no way affected the provisions of these instruments. The jury apparently disregarded this fanciful claim, built upon conjecture, which was inconsistent with the mass of the testimony as to the relations of the testatrix and the Lothrop family. The appellants lay great stress upon their exception to the refusal of the court to reinstate the testimony of the witness Ferrier which had been stricken out as too remote. This testimony was to the effect that about twenty years before the execution of this will he had seen Lothrop and Hannah Wilbur together in the Lothrop house when the other members of the Lothrop family were away from home and that Lothrop had sent him out of the house to work in the barn. The ruling of the justice was without error. The testimony in question was remote in point of time and also was without bearing upon the issues involved. Whatever might be said of this occurrence, if established, it never came to the knowledge of the testatrix and must have been unconnected with any influence which Lothrop had acquired over the mind of the testatrix, even if the jury should accept the unusual psychological theory of the appellants.

The appellants' exceptions are all overruled and the appeals are remitted to the Superior Court for further proceedings following the verdict.

Walling & Walling (Raymond T. O'Neil, of counsel). Charles A. Walsh (Walter J. Hennessey, of counsel), for appellants.

Tillinghast & Collins (James C. Collins, Harold E. Staples, of counsel), for appellees.

SARAH J. ATKINSON vs. MARGARET BIRMINGHAM et al. MARCH 10, 1922.

PRESENT: Sweetland, C. J., Vincent, Stearns, Rathbun, and Sweeney, JJ.

(1) Malicious Prosecution.

In an action for malicious prosecution, a plaintiff must establish by a preponderance of the evidence that defendant caused or assisted in causing the criminal prosecution to be instituted against him; therefore in a joint action, a verdict was properly directed for a defendant who simply reported truthfully facts to the police authorities and a defendant police officer who reported by direction of his superior officer the result of his interviews with plaintiff and other witnesses.

(2) Malicious Prosecution.

To warrant recovery in an action for malicious prosecution plaintiff must establish by a preponderance of the evidence that in prosecuting him, defendant was acting without probable cause and also with malice toward him, and while the question of malice is ordinarily for the determination of the jury, it should not be submitted to them, in the absence of facts which would warrant a finding of malice.

(3) Larceny. Lost Property.

To render a finder of lost property guilty of larceny the finder must appropriate the same to his own use at the time of finding, when at that time he knows who the owner is, or has the immediate means of ascertaining that fact. If for the first time the finder learns the identity of the owner sub-

sequent to the finding and then denies the finding, or refuses to deliver the property to the owner, such finder may be civilly liable for conversion, but is not guilty of larceny.

(4) Malicious Prosecution. Probable Cause. Malice.

While malice may be inferred from want of probable cause, this inference cannot be permitted, when the evidence showing a lack of probable cause also shows the absence of both ill-will and oppression.

STEARNS AND SWEENEY, JJ., dissenting.

TRESPASS ON THE CASE for malicious prosecution. Heard on exceptions of plaintiff and overruled.

SWEETLAND, C. J. This is an action of trespass upon the case for the alleged malicious prosecution of the plaintiff by the defendants Margaret Birmingham, James J. Costigan, a Captain of Police of Providence, and George M. Hindmarsh, a police officer of said city.

The case was tried in the Superior Court before Mr. Justice Brown sitting with a jury. At the conclusion of the evidence said justice upon motion of the defendants directed a verdict in their favor. The cause is before us upon the plaintiff's exception to this action of said justice. In her bill the plaintiff has included exceptions to other rulings of said justice made in the course of the trial. The plaintiff has not pressed before us the exceptions last mentioned. As the rulings, to which such exceptions were taken, did not affect the verdict directed, we assume that the plaintiff has abandoned them.

By the uncontradicted evidence presented at the trial the following facts appear. On the afternoon of December 4, 1918, while walking westerly towards Prairie avenue along the northerly sidewalk on Chester avenue in Providence, the defendant Margaret Birmingham lost from her open handbag a five dollar bill and a two dollar bill folded together. A little later the plaintiff, Sarah J. Atkinson, while walking easterly on said sidewalk saw some paper money lying on the ground, picked it up, and said to the witness Crown, who was present, that the money was hers. Later the defendant Birmingham while searching along Chester avenue learned from the witness Todd that the plaintiff had

found some money on the sidewalk. The defendant Birmingham then went to the plaintiff's house and demanded that the plaintiff deliver to her seven dollars, the amount which she had lost. The plaintiff offered to turn over to the defendant Birmingham two dollars which the plaintiff claimed was all that she had found. The defendant Birmingham reported her loss and the facts which she had learned to the defendant Costigan, who was Captain of the police precinct in which Chester avenue is situated. The defendant Costigan directed his subordinate, the defendant Hindmarsh, to interview the plaintiff, in company with Mrs. Birmingham, and later he directed said Hindmarsh, in company with another subordinate officer, named Griffin, to interview the witness Crown who was present at the time the plaintiff picked up the money on Chester avenue, and also to interview the witness Todd, who saw the plaintiff pick up money from the sidewalk. The defendant Hindmarsh and Officer Griffin reported to Captain Costigan the result of their interviews with the witnesses Crown and Todd to the effect that Crown said he saw Mrs. Atkinson pick up bills folded together and that there was more than one bill, that the witness Todd said that on the afternoon in question while she was sitting at a window of her house overlooking Chester avenue she saw the plaintiff pick up money lying on the sidewalk; that Mrs. Atkinson unfolded the money and she saw that there was more than one bill. Captain Costigan, himself, interviewed Mrs. Todd who repeated the same story that Hindmarsh and Griffin had reported. He also interviewed the plaintiff, who denied that she had found more than a two dollar bill and expressed her willingness to deliver that to the defendant Birmingham. Captain Costigan then reported the above facts to the Deputy Chief of Police and requested that a criminal complaint be made against the plaintiff charging her with the larceny of seven dollars from Mrs. Birmingham. Upon the complaint of the Deputy Chief, the District Court of the Sixth Judicial District issued its warrant, the plaintiff

was arraigned upon the complaint, pleaded not guilty, and was tried. Upon trial the plaintiff was found not guilty by the district court, and thereafter she commenced this action against said Birmingham, Costigan and Hindmarsh to recover damages for her alleged malicious prosecution by them.

In order to recover against either of these defendants the

plaintiff must establish by a preponderance of evidence that such defendant caused or assisted in causing said criminal prosecution to be instituted against her. As to the defendant Birmingham it appears that she truthfully reported the facts within her knowledge to Captain Costigan and that she neither induced nor requested the police authorities to commence said criminal proceeding, nor assisted in its prosecution save that when summoned by the police she (1) testified as a witness for the complainant. As to the defendant Hindmarsh it appears that his sole connection with the matter was to follow the direction of his superior officer and report to such superior officer the result of his interviews with the plaintiff and the witnesses Crown and Todd and later when summoned as a witness he testified as to such interviews. The justice was clearly warranted in ruling that there was no evidence before the jury that either of the defendants Birmingham and Hindmarsh had procured or had assisted in procuring the criminal prosecution of the plaintiff or had recommended or requested the same. There was no error in the ruling of said justice directing a verdict in favor of the defendants Birmingham and Hindmarsh.

With reference to the defendant Costigan it must be held that he was mainly responsible for the prosecution of the plaintiff. Hereafter in this opinion he will be referred to as "the defendant." In accordance with the practice of the Providence Police Department a criminal complaint instituted by the police is ordinarily preferred by the Deputy Chief of Police after consultation with and upon recommendation of the Captain of Police in whose precinct the alleged offence has been committed and who has made an investigation of the matter. The complaint against the plaintiff was formally made and sworn to by the Deputy Chief after he had been informed of the facts relied upon by the defendant and had approved of the defendant's conclusion. But the Deputy Chief was induced to act by reason of the recommendation and request of the defendant.

To warrant holding the defendant liable in this action, the plaintiff must establish by a preponderance of evidence that in prosecuting her upon the charge of larceny the defendant was acting without probable cause and also with malice toward her. From his investigation and the reports received from the investigations of his subordinate officers the defendant might not unreasonably believe that the money which the plaintiff found belonged to the defendant Birmingham: that she found a five dollar bill as well as a two dollar bill; that at the time of finding the money she had the intention of appropriating it, at least until she discovered the owner, and that when the money was demanded of her by the owner the plaintiff persisted in herintention of appropriating five dollars of the amount. These facts alone however did not constitute probable cause for the charge of larceny against the plaintiff.

To render the finder of lost property guilty of larceny such finder must appropriate the same to his own use at the time of finding, when at that time he knows who the owner is or has the immediate means of ascertaining that fact. If for the first time the finder learns the identity of the owner subsequent to the finding and then denies the finding or refuses to deliver the property to the owner such finder may be civilly liable for conversion but is not guilty of the crime of larceny; for in such circumstances the finder is held not to have taken and carried away the lost property, feloniously, from the actual or constructive possession of the owner. There is no evidence that the plaintiff at the time of the finding knew who was the owner of the money which she picked up and the circumstances indicate that

she did not. The owner was not in sight. There was no mark upon the money and at the time the plaintiff was clearly without means of ascertaining the owner. circumstances the original taking of the money was not felonious and the plaintiff was not guilty of larceny. must be held therefore that the facts in the possession of the defendant did not furnish ground for the opinion that the plaintiff was guilty of larceny. There was a lack of probable cause for instituting the criminal proceeding against the plaintiff. The defendant and his superior officers were acting under a misapprehension as to the facts and circumstances which in law constitute the crime of larceny in the finder of lost property. From the evidence it is plain that they erroneously, though honestly, believed that the finder's refusal to deliver the lost property to the owner upon demand amounted to the larceny of such property.

Although the defendant caused the prosecution of the plaintiff without probable cause there is an entire lack of evidence that in so doing he was acting with malice toward her. The question of malice is ordinarily for the determination of the jury; but that question should not be submitted to them in the absence of facts which would warrant a finding of malice.

It is frequently said that the action of malicious prosecution is not favored in the law. Probably no form of action at law can be said to be a favored one, or one which can be successfully maintained without sufficient proof of its essential elements. This court has approved the principle that public policy requires the protection of those who in good faith and upon reasonable ground have instituted criminal proceedings. Fox v. Smith, 25 R. I. 255. This perhaps amounts to no more than saying that no one shall be found liable in this form of action for instituting a criminal prosecution unless it is made to appear clearly that he acted without probable cause and with malice. Any favorable view however which the law is inclined to take with refer-

ence to the acts of those who commence criminal prosecutions surely should be applied to the acts of peace officers who are charged with the duty of protecting the persons and property of citizens and maintaining good order in the community. A captain of police, however, cannot escape liability if he acts without probable cause and with ill-will or with a wanton disregard of the rights of others. There is no evidence of ill-will on the part of the defendant toward the plaintiff. Before this matter arose he had never seen or heard of either the plaintiff or Mrs. Birmingham. conduct toward the plaintiff was neither reckless nor oppressive. He did not act until after reasonable investigation and then in accordance with what he believed to be a public He did not cause the arrest of the plaintiff but gave her ample notice that she might procure bail and voluntarily appear before the district court, there to be apprehended, arraigned and released upon entering into a recognizance for her appearance for trial.

As a result of his investigation the defendant might conclude that the plaintiff had found and still had in her possession the seven dollars lost by Mrs. Birmingham. He then acted upon his erroneous theory as to the law, i. e., if the plaintiff persisted in retaining the seven dollars after the owner had been disclosed to her and had demanded the delivery of the money, she thereby committed the crime of larcenv. The defendant testified that he informed the plaintiff that if she did not return the money he should proceed against her for larceny and he further testified that he commenced the criminal proceeding because the plaintiff did not return to Mrs. Birmingham the money which the plaintiff had found. This conduct on the part of the defendant does not warrant an application of the doctrine that malice is shown if it appears that criminal proceedings have been instituted for the private purpose of collecting a debt or enforcing a civil claim and not for the purpose of vindicating the law. It is perfectly plain that the defendant throughout was acting without private interest and in the performance of what he in good faith regarded as his public duty. His conduct as indicated by his testimony, to which we have just referred, is consistent with such purpose. In the defendant's view the crime of larceny was committed by the plaintiff only in the event that she retained the money after demand by the owner. His statement to the plaintiff was in accordance with that view. In effect the defendant told the plaintiff that if she did not deliver the money to the owner she would be guilty of larceny, and if she persisted in her refusal he should be obliged to charge her with that offence. The act of the defendant was intended in support of the law and not for the collection of a private debt.

The doctrine is established that malice may be inferred
(4) from a want of probable cause. This inference can not be
permitted however when the evidence showing a lack of
probable cause also shows the absence of both ill-will and
oppression.

For the reasons which we have indicated above we find that although there was an absence of probable cause for the criminal prosecution of the plaintiff, there is no evidence that the defendant Costigan acted with malice toward her.

The plaintiff's exception is overruled. The case is remitted to the Superior Court for the entry of judgment on the verdict.

Stearns, J., dissenting. It is agreed that there was no probable cause for the criminal proceeding. The trial justice directed a verdict for the defendants on the ground that there was probable cause. This action was erroneous. The trial justice did not rule on the question of malice which was not material if there was probable cause. The plaintiff having established want of probable cause is entitled to recover in her action of malicious prosecution upon proof of either actual malice or malice implied in law, or, as it is sometimes called, constructive malice.

Plaintiff is a married woman of good reputation who has lived in Providence for a number of years. The defendant

Costigan, who is a police captain in the city of Providence, knew all of the facts of the case, before he began the criminal proceeding. No crime had been committed and the plaintiff asserted her innocence. Captain Costigan then threatened plaintiff with a criminal prosecution unless she paid to the defendant Birmingham the seven dollars which the latter claimed she had lost. Upon plaintiff's refusal to do as directed, the criminal proceeding was begun.

Without any further consideration of the testimony, I think this action of the officer is a sufficient basis to warrant a jury in finding the existence of malice. It was an attempt to coerce plaintiff and a threat to use the machinery of the criminal law by a public officer to enforce the collection of a civil and individual claim. It may be that a jury, in view of the circumstances, might refuse to compel defendant Costigan to pay damages to plaintiff; but plaintiff, in my judgment, has the right to submit her case to a jury. The question on the direction of a verdict is not one in regard to the weight of the evidence of malice but rather, is there any evidence of malice; if there is, it is a question for the jury in the first instance, and is not a question of law.

The case against the defendant Costigan should be submitted to a jury. Plaintiff does not urge the case against the other defendants very strongly and with reason as there is but little evidence against them.

Plaintiff's exception to the action of the trial justice in directing a verdict for defendant Costigan should be sustained and the case should be remitted to the Superior Court for a new trial as to him.

I am authorized to state that Mr. Justice Sweeney concurs in this opinion.

Charles R. Easton, for plaintiff.

Washington R. Prescott, for defendant Birmingham.

Elmer S. Chace, City Solicitor, for defendants Costigan and Hindmarsh. Henry C. Cram, Oscar L. Heltzen, Ellis L. Yatman, Assistant City Solicitors, of counsel.

ANGELINE PARKER GEE et al., for an Opinion.

JANUARY 19, 1922.

PRESENT: Sweetland, C. J., Vincent, Stearns, Rathbun, and Sweeney, JJ.

(1) Wills. Construction. "Share and Share Alike." "Per Stirpes."

Under residuary clause, "all the rest and residue of my estate I give devise and bequeath to my said wife and to my sons and daughters their heirs and assigns, forever, share and share alike, per stirpes and not per capita;"—

Held, the intention of the testator governs and is to be ascertained by consideration of the provisions of the entire will and to assist in getting his point of view, the circumstances existing at the time of the execution of the will are to be considered;

Held, further, that from the language and structure of the will, the intention was clear that the wife and each child should take in equal shares under the residuary clause.

(2) Wills. Construction.

Where in a will two phrases are irreconcilable that construction should be preferred which gives effect to the expression of intention made in plain and ordinary terms rather than in technical phraseology.

Petition for construction of will.

STEARNS, J. This petition, for the construction of the residuary clause of the will of James Gee, late of Providence, deceased, is brought by all the parties in interest, who have concurred in stating a question in the form of a special case (Gen. Laws, Chap. 289, § 20).

James Gee died November 11, 1920. His will, which has been admitted to probate, was executed in 1913. In 1918 two short codicils were added which are unimportant and have no bearing on the question submitted to us. Angeline P. Gee was the second wife of James Gee. By his first marriage James Gee had five children, namely, Robert, William, Minnie, Alice and Annie; all of the children are married and have issue with the exception of Annie who is unmarried. The testator had no real estate at the time of his decease. His personal estate is inventoried at \$153,416.

The will is short and with the exception of the sixth or residuary clause is clearly and concisely drawn. By the first clause the testator gives to his two sons William and Robert, his library to be divided equally between them. By the second clause the wife is given the household furniture, automobiles, horses and carriages and other personal property belonging to testator's stable. By the third clause a bequest of \$1,000 each is made to his sister Annie and to his nephew Isaac. By the fourth clause a bequest of \$1,000 is made to a certain church. Then follow these two clauses: "Fifth: Having made provision for my said wife satisfactory to her I give and bequeath to each of my children the sum of twenty thousand dollars to each of them their heirs and assigns forever. Sixth: All the rest and residue of my estate I give devise and bequeath to my said wife and to my sons and daughters their heirs and assigns, forever, share and share alike, per stirpes and not per capita." In the seventh and concluding clause the testator appoints his sons, William and Robert, and his wife, Angeline, to be the executors and the executrix of his will and directs that they shall not be required to give any bond.

clause—Does the widow take thereunder one-half of the residue and do the sons and daughters of the testator take the other half as a class; or, do the widow and each of the sons and daughters of the testator individually take one-sixth of the residue? To state the question in another form, did the testator as between his widow and his children intend equality or inequality in the distribution of the residue?

The intention of the testator governs and is to be made effective if possible, if it can be accomplished fairly and without violating any unalterable rule of law. This intention is to be ascertained by consideration of the provisions of the entire will. Church v. Church, 15 R. I. 138; Perry v. Brown, 34 R. I. 203; Hazard v. Stevens, 36 R. I. 90; Branch v. DeWolf, 38 R. I. 395. To assist in ascertaining the intention of testator and to get his point of view the circumstances existing at the time of the execution of the will are to be considered by the court. Perry, Admr. v. Hunter et al., 2 R. I. 80; Boardman, Petr., 16 R. I. 131.

In this case strong evidence of the testator's point of view and of his intention is found in the language and the structure of the will itself, without the necessity of a resort to external evidence of the circumstances. By the first and second clauses bequests of specific personal property are given to the two sons and to the wife. The fifth clause is highly significant. Therefrom we learn that the testator had made provision for his wife before the execution of his will, which, as it was satisfactory to his wife, must have been known to her and approved by her. Any other provision for the wife apparently was neither expected by her nor required of the testator. Immediately following the above statement and as a part of the same clause, the testator then makes a bequest of twenty thousand dollars to each of his children. This gift is given to the children individually and not as a class. Thus far in the will the testator has treated the wife and the children individually and has shown no intent to establish any class. disposed of the larger part of his estate by different methods and by separate apportionment among the natural objects of his bounty and affection. Up to this time such differences in the distribution of his estate as testator desired to make between the widow and the sons and the daughters has not been left in doubt but has been provided for by specific action and direction. In disposing of the residue—the smaller part of the estate—if the testator desired to make an unequal distribution, that is to give the widow a greater or different share than a child, we naturally should expect the same clear expression of such intention as appears in the other parts of the will; but we do not discover any such intent. On the contrary, we think the intention was clear that the wife and each child should take in equal shares. There is an ambiguity and a contradiction in the terms of the residuary clause arising from the juxtaposition of the phrases "share and share alike" and "per stirpes and not per capita." The claim of the widow is that two classes are thus indicated, one consisting of the widow and the other of the sons and daughters. Were it not for the addition of the words "per stirpes and not per capita" there would be no uncertainty as the words "share and share alike" direct an equal distribution among all of the persons entitled.

"Per stirpes" is thus defined in Bouvier's Law Dictionary: "By or according to stock or root; by right of representation. When descendants take by representation of their parent, they are said to take per stirpes; that is, children take among them the share which their parent would have taken, if living." The primary and natural construction of this technical phrase is to consider it applicable to the issue of the children, in the event of the decease of their parent before the testator, rather than to the children of the testator. Whatever ambiguity there is arises from the inexact use of a legal phrase. Without this phrase, the meaning of the clause is clear and is expressed in language easily understood by a layman. If the two phrases are irreconcilable that construction should be preferred which gives effect to the expression of intention made in plain and ordinary terms rather than in technical phraseology. But any doubt which might exist from a consideration of this particular clause is removed by a consideration of the entire will. We think it was the intention of the testator that the wife and each child should take in equal shares under the residuary clause.

Our conclusion is that Angeline P. Gee and each of the sons and daughters of the testator individually take one-sixth of the residuary estate.

Waterman & Greenlaw, for Angeline Parker Gee. Alfred G. Chaffee, for other petitioners.

MARY WHALEN vs. CLARENCE M. DUNBAR et al. JANUARY 18, 1922.

PRESENT: Sweetland, C. J., Vincent, and Rathbun, JJ.

(1) Automobiles. Negligence. New Trial. Evidence Opposed to Facts.

Where the driver of an automobile in which plaintiff was a passenger, was confronted with an emergency involving a rear end collision, and turned to the left and while proceeding diagonally across the road collided with defendant's automobile coming toward him, testimony of plaintiff's witnesses that after the driver turned to the left defendant's automobile ran several hundred feet and that four or five seconds elapsed before the collision, cannot be given weight where it appears that at the time of the collision one of the forward wheels of the car in which plaintiff was riding was about on a line with the rear wheels of the front automobile and the rear end of the car was still behind the forward automobile, for where testimony is opposed to established physical facts it must yield to such facts.

(2) Automobiles. Negligence. Rate of Speed. New Trial.

Where the speed of defendant's automobile in no wise contributed to the accident, the rate of speed is immaterial and liability of defendant cannot be predicated upon the speed of his car.

TRESPASS ON THE CASE for personal injury. Heard on exceptions of defendant and sustained.

RATHBUN, J. This is an action of trespass on the case for negligence brought to recover for personal injuries suffered by the plaintiff and caused by a collision between an automobile in which she was riding as a passenger and another automobile owned by the defendant and operated by his chauffeur. The trial in the Superior Court resulted in a verdict for the plaintiff for \$1,500. The case is before this court on the defendant's exception to the ruling of the trial court refusing to direct a verdict for the defendant.

The collision occurred a short distance south of "Dago Switch" in the town of Warwick near the village of Norwood on the State highway leading from Apponaug to Providence. Said highway runs in a northerly and southerly course and has a macadam surface eighteen feet in width. A street car track is located on the extreme westerly side of the highway. The plaintiff and four gentlemen were passengers in a Ford touring car owned and operated by William Brown. While

said touring car was proceeding on the right hand side of the macadam surface of said highway in a northerly direction and following another Ford automobile the speed of the front automobile was suddenly reduced. To avoid running against the rear end of the front automobile Brown turned his automobile to the left and when one of the front wheels of his automobile was about on a line with the rear wheels of the front automobile Brown's automobile collided with the defendant's automobile, which was being driven in a southerly direction. Witnesses for the plaintiff gave various estimates as to the speed at which defendant's automobile was running at the time the automobile in which the plaintiff was riding turned to the left. Some of herwitnesses estimated the speed of defendant's automobile to be from fifty-five to sixty miles per hour. The highest estimate given by the defendant's witnesses was twenty-five miles per hour. The defendant's counsel admit that Brown was not the servant of the plaintiff; that she had no control over him and that contributory negligence can not be attributed to the plaintiff.

The plaintiff contends that it was the province of the jury to decide whether the defendant's automobile was proceeding at an unreasonable rate of speed and whether his chauffeur had the last clear chance to avoid the accident, and that the trial court did not err in submitting the case to the jury upon these issues.

John W. Holland, one of the passengers in Brown's automobile and a witness called by the plaintiff, testified as follows: "When he came out he had practically got out half of his machine, but not quite, on the other side."
... "I didn't know what was the matter. Q. When you turned out how far did you turn out? A. We were at an angle when we were struck. Q. At an angle turning out when you were struck? A. Yes, sir." . . . "Q. But your car was still practically upon the right side of the highway? A. Not quite. It hadn't quite got out. It was at an angle. Q. Had it got up to the car ahead?

A. The front wheels of our car was about on a line with the rear wheels of the car which was almost stopped. Q. At the time you were struck? A. Yes, sir. Q. And the rear of your car was still back upon your right hand side of the road? A. Practically it was." . . . "Q. As you pulled to the left from behind that car weren't you struck on the right hand side of your machine? A. I couldn't say because it came so quick. I really couldn't say. Q. It was right there when you pulled out? A. Well, not exactly when we pulled out, no sir, we pulled out gradually. Q. It was there before you got out? A. Yes, sir."

Owen Joseph Donnelly, a passenger in Brown's automobile and a witness called by the plaintiff, testified as follows: "Q. You say that Mr. Brown turned out? A. Yes, sir. Q. Which way had he turned out? A. To the left, yes, sir. Q. Had the turn that he made been completed when the collision occurred? A. No, sir, it was not. Q. Then the turn was not completed when the accident occurred? A. No, sir, it wasn't. Q. You was just pulling out at that time? A. Yes, sir, you are right. Q. You never turned way out? A. No, sir; we were on an angle. The collision came. Q. Almost instantly? A. Yes, sir, almost, in about a second."

Frank Stephenson, a passenger in Brown's automobile and a witness called by the plaintiff, testified as follows: "Q. While you were turning out you were struck? A. Just as—we were not quite straight. When we were struck we were not quite straight. We were on the turn. Q. You were on the turn in the process of turning out? A. Process of turning out. Q. Weren't you turning out when you were struck? A. Yes, sir." . . . "Q. When he said, 'almost instantly,' you said 'almost,' did you not? A. Yes, sir, I will say it was almost. Q. In about a second? A. No, sir, not a second." . . . "Q. How long did they continue to run along after he began to make the turn before the collision? A. A couple of seconds, I guess. This all happened so quick. Q. A couple of seconds? A. Yes, sir."

Leo G. Roy, a witness called by the plaintiff, testified as follows: "Q. Will you tell us further as to what the Ford machine did after that, if you recollect? A. Well, after that—Q. Before it was struck. A. I saw it swerve and it seemed to me as though it never gone any further. I don't know whether it was trying to get back but it got struck about the same place he swerved out."... "A. The rear Ford wheel, the front Ford wheel of the rear Ford was about even with the back wheel of the forward Ford machine."

Tony Giardano, a witness called by the plaintiff, testified as follows: "Q. Just as he pulled out they were struck? A. Yes, sir."

The plaintiff testified as follows: "Q. When you were struck he was pulling to the left? A. Yes, sir, I think he was. Q. The machine hadn't got out into the road at the time you were struck? A. No, it hadn't."

Some of the plaintiff's witnesses testified that four or five seconds elapsed between the time when the automobile in which the plaintiff was riding commenced to turn to the left and the time when the collision occurred; also that the defendant's automobile was five hundred or six hundred feet away when the automobile in which the plaintiff was a passenger commenced to turn to the left. Does testimony of such a character, in view of the physical facts presented and other contradictory testimony by the same witnesses, entitle the plaintiff to go to the jury on the question of the last clear chance of the defendant's chauffeur to avoid the accident? The plaintiff's witnesses testified that the defendant's chauffeur was driving on the right hand side of the macadam surface and that he turned further to the right before the collision occurred. All of the witnesses agree (and the truth of their testimony is established by the photographs of the damaged automobiles) that the left hand front wheel and mudguard of the defendant's automobile collided with the right hand forward wheel and mudguard of the automobile in which the plaintiff was riding. The defendant's chauffeur testified relative to statements made immediately after the collision by Brown, the driver of the automobile in which the plaintiff was a passenger, as follows: "He said he did not blame the least bit; that he had three things to do, either go to the right or have a rear end collision and not seeing me coming he swung out to the left." Brown was available as a witness but the plaintiff did not call him to contradict the statements attributed to him or for any other purpose.

From all the testimony it is clear that Brown was confronted with an emergency when the automobile which he was following slackened its speed. To avoid a collision with the rear end of the forward automobile he turned to the left. His escape from a danger which he saw brought him into a (1) peril which, according to the testimony, he failed to observe. The testimony of both the plaintiff's and the defendant's witnesses is to the effect that Brown to avoid the automobile in front of him turned to the left and collided with the defendant's automobile while Brown's automobile was proceeding diagonally across the road. When the collision occurred one of the forward wheels of Brown's automobile was about upon a line with the rear wheels of the front automobile and the rear end of Brown's automobile was still behind the forward automobile. In view of the above facts it is idle to contend that the defendant's automobile, · after Brown turned to the left, ran several hundred feet or that four or five seconds, or any appreciable time, elapsed before the collision occurred. When Brown's automobile was running diagonally across the road it could not at the same time be moving sidewise in a northerly direction and vet such conduct would be necessary to account for Brown's automobile keeping pace with the forward automobile.

When testimony is opposed to established physical facts the testimony must yield to such facts. In *Dodds* v. *Omaha & C. B. St. R. Co.*, 178 N. W. (Neb.) 258, the court said: "The rule that a verdict will not be disturbed when there is evidence tending to support it does not apply where the

verdict is opposed to the undisputed physical facts in the case, or is in flat contradiction of recognized physical laws, and where the testimony presented, taken as a whole, is capable of no reasonable inference of such a state of facts as would allow the plaintiff to recover." In Gorman v. Hand Brewing Company, 28 R. I. 180, this court quoted with approval from the case of Anderson v. Liljengren, 50 Minn. 3, "'The rule undoubtedly is that, where the positive testimony of a witness is uncontradicted and unimpeached, either by other positive testimony or by circumstantial evidence, either intrinsic or extrinsic, it can not be disregarded, but must control the decision of the court or jury. But a witness may be contradicted by the facts he states as completely as by direct adverse testimony. court or jury is not bound to accept it as true merely because there is no direct testimony contradicting it, where it contains inherent improbabilities or contradictions, which alone. or in connection with other circumstances in evidence satisfy them of its falsity."

There is no testimony in the case of any probative value upon which can be based a finding that the defendant's chauffeur could have avoided the accident after he saw or should have seen the predicament in which Brown's automobile was placed.

The remaining question is whether the defendant's chauffeur was driving at a negligent rate of speed and if so whether such speed contributed to the accident.

All of the testimony of any probative value relative to this question is to the effect, and the physical facts demonstrate, that the collision occurred while Brown's automobile was proceeding diagonally across the road and when the front of his automobile must have been near the westerly side of the macadam surface and that the collision occurred almost immediately after Brown turned to the left. There was no danger whatever, regardless of the speed of the defendant's automobile, until Brown suddenly drove his automobile across the road in front of the defendant's

automobile at such close proximity to it that the collision was inevitable. If it should be conceded that the defendant's automobile at the time the emergency was created was proceeding at a rate of speed in excess of the statutory limit there was no testimony of probative value showing or tending to show that the accident would not have happened if the defendant's automobile had been proceeding at the rate of twenty-five miles per hour or even at a much less rate of speed, or that the speed of the defendant's automobile in any way entered into the cause of the collision. As the speed of the defendant's automobile in no wise contributed to the accident the rate of speed is immaterial and liability can not be predicated upon the speed of said automobile. Burlie v. Stephens, 193 Pac. (Wash.) 684; Cross v. Rosencranz, 195 Pac. (Kan.) 857.

We think that the trial court should have granted the defendant's motion for direction of a verdict in his behalf. The defendant's exception is sustained. The plaintiff may appear before this court, if she shall see fit, on Monday January 23, 1922, at ten o'clock a. m., and show cause why an order should not be made remitting the case to the Superior Court with direction to enter judgment for the defendant.

Baker, Spicer & Letts, for plaintiff. Ira Lloyd Letts, James I. Shepard, of counsel.

Waterman & Greenlaw, for defendant. Lewis A. Waterman, Ralph M. Greenlaw, Charles E. Tilley, of counsel.

GEORGE HAWLEY CLARKE et al. vs. Town of East Providence et al.

FEBRUARY 10, 1922.

PRESENT: Sweetland, C. J., Vincent, Stearns, Rathbun, and Sweeney, JJ.

Under the provisions of Gen. Laws, 1909, cap. 317, § 1, giving to town councils the right to direct the town treasurer to take possession of any real or personal estate upon the death of any person who shall leave no heirs or

legal representatives to claim the same, a town council passed a vote directing the town treasurer to take such possession. This was not immediately done with the exception of some real estate and thereafter upon petition of a creditor an administrator was appointed who settled the estate and by direction of the probate court turned over the balance of the estate to the town treasurer. The appellants filed their petition in the probate court praying that the estate be turned over to them as entitled thereto which petition was dismissed.

Held, that the failure of the town council to take immediate possession of the personal estate did not debar it from the exercise of that right whenever in its judgment it became desirable to do so, and that having accomplished the final settlement of the estate, and decreed that the balance be turned over to the town the probate court had no further jurisdiction in the matter.

PROBATE APPEAL. Heard on exceptions of appellants to decision of Superior Court affirming action of Probate Court in dismissing petition and exceptions overruled.

VINCENT, J. This case comes to us upon exceptions to the decision of the Superior Court dismissing the appellants' appeal from a decree of the Probate Court of the town of East Providence. The appellants, by their original petition in the probate court, asked that certain personal estate formerly belonging to one Eugene Wilson, deceased, should be turned over to them, as the heirs at law of the said Wilson, a final settlement of the estate of the deceased having been reached in that court. The probate court dismissed the petition of the appellants for lack of jurisdiction and on appeal to the Superior Court the action of the probate court was affirmed.

On May 15, 1909, Eugene Wilson, a resident of East Providence, deceased. He had been for many years a recluse and was not known to have any near relatives or next of kin.

On May 17, 1909, the town council of East Providence, at a special meeting, passed the following vote, viz:—"On Motion of Councilman Phillips it is Voted, That Fred B. Halliday, Town Treasurer of the Town of East Providence, be directed to take into his possession all the real and personal estate of Eugene Wilson, late of said East Providence, deceased, intestate, which to the said Eugene Wilson at the

time of his death, did appertain and belong, for the use of said Town of East Providence, until the heir or other legal representative of such deceased person shall call for the same, to whom the same shall be delivered on being claimed and evidence of the right or title of the claimant shown, according to the Statutes and Public Laws in such case made and provided."

On September 27, 1909, James H. Williams of East Providence, an undertaker and creditor, petitioned the probate court for the appointment of an administrator upon the estate of the said Wilson. Upon this petition, Fred B. Halliday, being the person named as town treasurer in the vote of the town, was appointed administrator on October 25, 1909, and gave bond in the sum of \$15,000.

On January 10, 1910, the administrator filed an inventory showing personal property amounting to \$15,887.75.

On November 2, 1915, Halliday ceased to be town treasurer.

Nearly four years later, June 4, 1919, Halliday filed his first and final account, as administrator, showing a balance of \$21,913.30. On August 25, 1919, this account was allowed by the Probate Court of East Providence and the balance ordered turned over to the town treasurer of said town.

This order was complied with by Halliday who withdrew the fund from the Providence Institution for Savings on August 26, 1919, and turned it over to Herbert E. Barney, then the town treasurer of said town. At that time no heirs had appeared to claim the estate and were still unknown.

On July 10, 1920, the appellants filed their petition in the Probate Court of the Town of East Providence praying that the estate of the said Wilson be turned over and delivered to them, they being entitled thereto.

William E. Smith, town clerk of the town of East Providence and also clerk of the probate court of that town, was called as a witness at the hearing in the Superior Court. From his testimony it appears that the appellants addressed

a letter to the town council asking that a time and place might be fixed for the presentation of their claims against the Wilson estate. The date of this does not appear in the testimony of Smith and we do not find the original or any copy of the communication among the papers in the case. The date however is not especially important in view of the fact that in reply to this request the town council, on September 8, 1920, passed a vote, of which presumably the appellants were informed, to the effect that the town of East Providence would release the property in question whenever directed to do so by the proper court.

The appellants by their bill of exceptions present but a single question. Was the Superior Court in error in affirming the decree of the Probate Court of the Town of East Providence dismissing the appellants' petition?

Although the town council of East Providence passed the vote directing the treasurer to take possession of the Wilson property, such possession of the personal estate was not immediately taken. There is testimony that a small part of the Wilson property which was real estate was taken at once into the possession of the town through its treasurer, Halliday, under and by virtue of the vote before referred to and that the town has since retained its possession thereof.

Before the town finally obtained possession of the personal estate, a creditor appeared in the person of an undertaker who made application to the probate court for the appointment of an administrator. Whether or not he might have proceeded against the town for the satisfaction of his claim, had they possessed the personal estate or at a later time become possessed of it, is a question which is not presented to us and which we need not discuss. We can only consider the question which is raised by the exceptions.

Mr. Halliday was duly appointed administrator and proceeded to and did settle the estate, so far as the probate court was concerned, his final account being presented and allowed.

Mr. Halliday was also the town treasurer of East Providence at the time of his appointment as administrator but, so far as the settlement of the estate in the probate court was concerned, he simply acted as any administrator would in the settlement of an estate.

He did not, so far as appears, up to the time of the final settlement of his account, act in behalf of the town in any respect regarding this estate. In fact, for about four years prior to the settlement of his final account, he had not been the town treasurer of East Providence.

Upon the settlement of the final account, the court ordered the administrator to turn over the balance in his hands, consisting of a large deposit in the Providence Institution for Savings, to the town and on the day following such order he complied therewith.

The vote of the town directing the town treasurer to take possession of the Wilson estate had never been rescinded. The most that can be said is that it was allowed to remain in abeyance during the settlement of the estate in the probate court.

With the final settlement of the estate there was nothing further for the probate court to pass upon and we think that its action in directing the turning over of the money to the town was proper.

Whether or not the town was entitled to and might have taken possession of the whole estate under the terms of the statute, notwithstanding the proceedings in the probate court, we need not discuss. The personal estate did not come into the possession of the town until the administrator, Halliday, in obedience to the order of the probate court, turned it over to Herbert E. Barney who was then the town treasurer.

Section 1 of Chapter 317, Gen. Laws of 1909, gives to (1) town councils the right to direct the town treasurer to take possession of any real or personal estate upon the death of any person who shall leave no heirs or legal representatives to claim the same.

We do not think that the failure of the town council to take immediate possession of the personal estate in the present case operated in any way to debar it from the exercise of that right whenever in its judgment it became desirable to do so. It was not unreasonable for the town to delay the assertion of this right while the probate court was acting upon and disposing of claims against the estate.

We think that the probate court, having accomplished the final settlement of the estate and having decreed that the balance be turned over to the town, had no further jurisdiction in the matter and also that the decision of the Superior Court in favor of the appellees was fully justified.

The appellants' exceptions are overruled and the case is remitted to the Superior Court for further proceedings.

Cunningham & O'Connell. Jeremiah E. O'Connell, John J. Dwyer, for appellants.

A. Truman Patterson, Town Solicitor, for town of East Providence.

Danforth K. Barrett vs. Rhode Island Co. MARCH 8, 1922.

MARCH 6, 1022.

PRESENT: Sweetland C. J., Vincent, Stearns, Rathbun, and Sweeney, JJ.

(1) Automobiles. Negligence of Passenger.

While it is true that when the circumstances of the case warrant it, the question of the contributory negligence of the passenger in an automobile may be submitted to the jury under proper instructions, a request to charge in regard to the liability of the passenger which carries the implication that the passenger must exercise some care or make some protest against the action of the driver, if he would escape the charge of contributory negligence is too broad for the question for the jury is, whether under the particular circumstances of the case, the passenger was negligent in failing to apprise the driver of the danger.

(2) New Trial.

The denial of the defendant's motion for a new trial is not controlling where from the language of the trial court it may be reasonably inferred that the court found but little to support the plaintiff's case.

TRESPASS ON THE CASE for negligence. Heard on exceptions of defendant and sustained.

VINCENT, J. This is an action of trespass on the case for negligence brought by Danforth K. Barrett against the Rhode Island Company to recover damages for injuries arising out of a collision between an automobile in which the plaintiff was riding and one of the cars of the defendant.

The case was tried in the Superior Court before a justice thereof sitting with a jury and a verdict was rendered for the plaintiff in the sum of \$4,000.

The defendant's motion for a new trial was heard and denied by the trial justice and the case is now before us upon exceptions of the defendant. These exceptions are five in number and cover the refusal of the trial justice to direct a verdict for the defendant; the refusal to charge as requested; and the denial of the motion for a new trial.

The plaintiff, at the time of the accident, was riding in an automobile upon the invitation of a friend who was the owner and driver thereof. The plaintiff was being taken from the central part of the city to his home on Forest street. The automobile after passing through various streets turned from North Main street into Doyle Avenue and proceeded along that thoroughfare until it approached the corner of Camp street. The automobile was being driven at a speed of about thirteen miles an hour upon a moderately rising grade.

The driver of the automobile, with the intention of making a sweeping turn and going north on Camp street first directed his course toward the southerly side of Doyle avenue in order to facilitate that movement. As the automobile approached the corner of Camp street, the driver thereof saw an electric car which had stopped at the southerly corner of Doyle avenue and Camp street to let off passengers. He continued on, making his turn to go north on the latter street, and when his front wheels reached the first rail of the car track the electric car and the automobile came together with sufficient force to throw the plaintiff forward and bring him in contact with the wind shield, through which he suffered some injury.

The vital question in the case seems to be, Did the car start up after the automobile got in front of it or did the automobile swing around in front of the car after the latter had gotten underway?

The plaintiff testified that when he first saw the electric car he was under the impression it was standing still but was not sure whether it was or not as he paid no more attention to it until it was about to hit the automobile.

The driver of the car, Mr. Birtwhistle, testified in cross-examination that when his front wheels landed on the rail the car was only two or three feet away.

Miss Bradley, who worked under Mr. Birtwhistle at the Shepard Store and who was a passenger on the electric car, testified that the latter had started when she saw the rear of the automobile rounding the corner and the crash occurred almost immediately.

Mr. Woodward heard the horn of the automobile after the car started. The horn was sounded according to Mr. Birtwhistle, the driver, before he made the turn into Camp street.

Mr. Mathewson says that he saw the automobile turn the corner and disappear up Camp street before the electric car started. This is a brief summary of the testimony of the plaintiff and the four witnesses who testified in his behalf so far as the same relates to the respective movements of the two vehicles just prior to the collision.

From the testimony of Mr. Mathewson it is quite evident that he must have been mistaken. If the automobile had rounded the corner and disappeared up Camp street before the electric car started, the collision could not have occurred near to the place where the car had stopped to let off passengers and besides, if the automobile had passed beyond the car, the former would have been struck in the rear rather than on the side which the testimony shows was the place of contact.

There is some conflict of testimony as to whether the automobile first struck the side of the electric car and then swung round in front of it or reached the car track without such previous contact. The determination of that particular question would be of little, if any, use in arriving at a conclusion as to the negligence of the defendant if the car was in motion at the time of either occurrence.

There is substantial testimony on behalf of the defendant, which we need not go into in detail, to the effect that the driver of the automobile undertook to pass in front of the electric car after the latter had started, and that the motorman did all he could to avert the accident.

In fact there is very little in the testimony in behalf of the plaintiff bearing upon the question of the defendant's negligence.

The defendant's request to charge, which is the subject of its second exception and which was denied by the trial court, is in the following words: "Although the negligence of the driver of an automobile is not to be charged to a passenger in the automobile yet a passenger in an automobile sitting on the front seat must use some care of his own and if he allows, without protest on his part, himself to be driven into a place of danger in front of an electric car, the passenger may be found guilty of negligence separate and apart from that of the driver."

It is undoubtedly true that when the circumstances of the (1) case warrant it the question of the contributory negligence of the passenger may be submitted to the jury under proper instructions. We think, however, that in the present case the request was properly refused for two reasons. (1) Because the language is too broad. It carries the implication that the passenger must exercise some care or make some protest against the action of the driver if he would escape the charge of contributory negligence. The question for the jury is whether under the particular circumstances of the case the plaintiff was negligent in failing to apprise the driver of the danger. The defendant's request is, from its language, open to the objection that it requires the passenger to do something for which he may have had no warrant or opportunity. (2) We find here no evidence

which would require the trial court to charge the jury as to the negligence of the plaintiff and therefore the refusal of the request was not harmful to the defendant.

While the denial of the motion for a new trial by the trial justice is entitled to and is usually given much consideration by this court, we do not feel that it is controlling in the present case. All that the trial justice is able to say bearing on the preponderance of the evidence is, "I cannot say that there was no basis for the jury's finding that the motorman was negligent."

From this language it may be reasonably inferred that the trial justice had found but little to support the plaintiff's case.

In regard to the amount of damages awarded by the jury, the trial justice says that they are excessive in his judgment but that he did not see his way clear to make any reduction.

We do not feel altogether warranted in sending the case back for the entry of judgment for the defendant but we think that justice requires that there should be a new trial.

The defendant's exceptions numbered 1 and 2 are overruled, those numbered 3, 4, and 5 are sustained, and the case is remitted to the Superior Court with direction to give the defendant a new trial.

Huddy, Emerson & Moulton, F. B. Frost, of counsel, for plaintiff.

Clifford Whipple, Alonzo R. Williams, for defendant.

OWEN P. LEE vs. EVERETT E. JONES et al.

MARCH 10, 1922.

PRESENT: Sweetland, C. J., Vincent, Stearns, Rathbun, and Sweeney, JJ.

(1) Malicious Prosecution. Discontinuance of Criminal Complaint.

Plaintiff is not barred from maintaining an action for malicious prosecution by the fact that he consented to the discontinuance of the criminal complaint against him, where, after notice to his attorney that the prosecutor considered plaintiff innocent of the charge against him, the attorney asked the prosecutor if he would have the case dismissed, and it was discontinued. Distinguishing Russell v. Morgan, 24 R. I. 134.

- (2) False Imprisonment. Malicious Prosecution.
- An action will not lie against a defendant either for false imprisonment or for malicious prosecution where he simply made complaint of the commission of a crime and the proceedings against plaintiff were begun by the sheriff acting on his own judgment.
- (3) Malicious Prosecution. False Imprisonment.
- Inaccuracy in a criminal complaint in the allegation of the person defrauded is immaterial in proceedings brought by the defendant in such criminal complaint charging false imprisonment and malicious prosecution as the real question is not who was defrauded but who committed the fraud.
- (4) Criminal Complaint. Time. False Imprisonment. Malicious Prosecution.
- In a criminal complaint the allegation of the date of the commission of the crime is formal and the prosecution is not bound thereby and an error in this regard is not material in an action by the defendant in the criminal complaint charging false imprisonment and malicious prosecution.
- (5) False Imprisonment.
- An action for false imprisonment will not lie when the arrest is made under process valid on its face and issued by a court of competent jurisdiction, even if the investigation by the officer was insufficient, as negligence of the officer does not invalidate the process, the gist of the action being the unlawful detention of another without his consent, and malice not being an essential element of this form of action.
- (6) Malicious Prosecution. Probable Cause. Question of Law.

Where the facts are not in dispute, the question of probable cause is one of law.

- (7) Malcious Prosecution. Probable Cause.
- Where an officer after an investigation as to guilt of the accused, had reasonable grounds to believe him probably guilty, an action for malicious prosecution will not lie.
- (8) Malicious Prosecution. Probable Cause,
- An honest and reasonable belief as to guilt of accused is a valid defence to an action for malicious prosecution.
- (9) Malicious Prosecution. Probable Cause.
- Where an officer stated the case fairly to his counsel and acted in good faith on the advice of counsel, he is not liable for malicious prosecution.

TRESPASS for false imprisonment in which counts in trespass on the case for malicious prosecution were joined. Heard on exceptions of plaintiff and overruled.

STEARNS, J. This is an action of trespass for false imprisonment in which are joined counts in trespass on the

case for malicious prosecution. The defendant Everett E. Jones pleaded the general issue to each count. The defendant John R. Wilcox, who is the Sheriff of Washington County, to the counts for false imprisonment, pleaded justification in that the arrest complained of was made by him in his official capacity on a valid warrant commanding the arrest of the plaintiff, and the general issue to the counts for malicious prosecution.

The case was tried before a jury and at the conclusion of the testimony the trial justice, on motion of the defendants, directed a verdict for the defendants. Plaintiff's exception to this action of the trial justice is the main question raised by his bill of exceptions. It is conceded that the action of the trial justice was correct in directing a verdict in favor of the defendant Oliver Jones.

In the summer of 1918 a check dated July 11, 1918, drawn by the Coast Fish Co. Inc., of New York City, for \$45.25, payable to Elmer Babcock, a resident of Wakefield, R. I., was received by mail at the Post Office in Wakefield and by mistake the letter, enclosing the check, which was addressed to Elmer Babcock was deposited in the Post Office box of one Elmer E. Babcock, a nephew of the payee.

Elmer E. Babcock, who knew that the check did not belong to him, indorsed the check as follows, "Elmer Babcock," and, as he admitted, thereby committed a forgery. He testified that he held the check for a short time, but does not know just how long, and then cashed it at the store of defendant Everett E. Jones in Wakefield, who was doing business under the name and style of "Jones Bros." Everett E. Jones testified that he knew nothing of the cashing of this check until late in the fall, when he was notified by the Wakefield Trust Co., with whom the check had been deposited for collection, that the indorsement was forged; he paid the amount of the check to the Trust Co. and some six weeks later the check was returned to him. Jones had no record in his store of the date of the cashing of the check but upon inquiry he learned from one of his

clerks that, although she could not tell the time definitely, she thought she remembered cashing the check for the plaintiff Owen Lee. Plaintiff was a customer of Jones and had cashed checks at different times at the store. On or about July 15th plaintiff made a purchase at the store, in payment for which it is claimed a check was cashed for him. After receiving the check from the bank Jones turned the check over to Sheriff Wilcox on December 8th and the latter at once began an investigation of the case. At the request of the Sheriff, Jones procured and gave to the Sheriff a sample of the plaintiff's handwriting in which the words "Elmer Babcock" appeared. At this time Jones did not know when the check had been cashed, but supposed from the date on the check that it had been cashed at his store a few days after the date of the check. He did not tell the Sheriff the date when it was cashed and does not remember whether the Sheriff asked in regard to this. Subsequently it was discovered from the Trust Co. that the check was deposited on Monday. August 26th, and Jones from that fact thought the check must have been cashed in his store on the preceding Saturday, the 24th of August. Plaintiff, who had been living with an aunt in Wakefield, after the 18th of July went to live for a few days with his uncle Elmer Babcock. On the 22d of July, plaintiff was mustered into the United States Army under the Selective Service act, at East Greenwich, and on the following day he went to an army camp on Long Island. He was honorably discharged from the service on December 13th and arrived home in Wakefield, December 14. He was in Wakefield on leave a part of two days in early November.

Sheriff Wilcox testified that Jones told him he thought the check was cashed about the 14th or 15th of July, judging from the date of the check and also because plaintiff had bought clothes in his store about the 15th or 16th of July. After interviewing the clerks in Jones's store, the Sheriff interviewed the postmaster and his assistant. From them he learned that plaintiff's mail had been regularly placed in

the box of his uncle, Elmer Babcock, from whence all of the mail in the box was taken at different times by plaintiff or Babcock's children; that in the fall of 1918 the postmaster had been directed by Mrs. Elmer Babcock not to deliver any more of their mail to any one except on written order. The Sheriff submitted the check and specimens of plaintiff's handwriting to various people, including the postmaster and the teller of the Trust Co. All agreed that the handwriting was the same on each exhibit. The Sheriff then stated the results of his investigation and submitted the writings to a friend, a captain of police in the city of Providence, who had had much experience in criminal cases and also to the justice of the local district court who was a lawyer. By each of them he was advised that the case was a proper one to be brought against the plaintiff and that the handwriting of each exhibit was made by the same person. The Sheriff then consulted his attorney in Westerly, a practicing lawyer of experience and of good standing in his profession. Sheriff testified that he stated to his attorney all the facts in regard to the case. In this he is corroborated by the attorney who testified in detail as to the statements made to him by the Sheriff. The attorney advised the Sheriff that he had a good case against the plaintiff and that he thought it was his duty to bring the prosecution. The Sheriff then applied to the judge of the district court, who prepared a complaint and warrant for the arrest of the plaintiff on the charge of forgery which was sent by mail to the Sheriff and on the 28th of December the complaint and warrant, having been sworn to before a local justice of the peace, was turned over by the Sheriff to his deputy with instructions to have the plaintiff brought in. The deputy notified plaintiff that the Sheriff wished to see him and on the afternoon of the same day, after an interview between the plaintiff and the Sheriff, the Sheriff directed the deputy to serve the warrant and plaintiff was arrested thereon. He was arraigned the same day and for want of bail was committed to the county jail. On the following Monday

morning, the first court day after his arrest, he was arraigned

in the district court and gave bail. Shortly afterward the Sheriff for the first time learned there was another Elmer Babcock in Wakefield. He obtained samples of the handwriting of this Elmer E. Babcock and, finding that it was similar to the handwriting on the check, he interviewed Elmer E. Babcock with the result that the latter admitted he had forged the indorsement on the check. Thereupon (1) the Sheriff immediately telephoned the attorney for the plaintiff, and told him that his client was innocent. tiff's attorney, according to the testimony of the Sheriff. which was uncontradicted, then asked the Sheriff if he would have the case against plaintiff dismissed. The Sheriff stated that he would do so and on the next court day the case was discontinued in open court, the Sheriff stating to the court that Lee was innocent and that he wanted to exonerate Lee and have him honorably discharged from the court.

Plaintiff is not barred by thus consenting to the discontinuance of the criminal complaint. The case is different from Russell v. Morgan, 24 R. I. 134, in which case the discontinuance of an action for malicious prosecution was entered by the court in accordance with the written agreement of the parties to the action. In the circumstances to require the plaintiff to insist on further court proceedings in order to protect any right of action he might have against the defendants would be unreasonable and would only result in giving greater publicity to the charge erroneously made.

It is claimed that Everett E. Jones had so connected himself with the institution and prosecution of the complaint that he made himself finally responsible therefor and that there was such irregularity in the making of the complaint and the issuing of the warrant thereon that neither of the defendants is entitled to any protection by reason of the issuance of the warrant. There is no evidence to support a finding against Everett E. Jones on any of the counts. He made a complaint of the commission of a crime. The (2) proceedings were begun by the Sheriff acting on his own-

judgment. The complaint and warrant charge that the check was cashed at Jones Bros. store July 20. Plaintiff expressly disclaims any charge that this allegation was due to any conscious misrepresentation by defendant Wilcox, but he does claim that it was a misstatement which was due to gross negligence; that on the back of the check it appears (3) that the check was paid by the drawee bank, August 28. 1918, and thus it was notice to the Sheriff of the date of the offence. Plaintiff appears to be in error in this respect. Some of the indorsements are not very plain. Neither the indorsement of Jones Bros. to Wakefield Trust Co. nor of the latter company to any bank for collection have any date. The only date, August 28th, is the receipt of payment by the Franklin Trust Co. There is nothing on the check which shows the date when it was first cashed. Negligence is also charged in that the complaint charges an intent to defraud Jones Bros., a copartnership, whereas in fact there was no copartnership. This inaccuracy in the allegation of the person defrauded is immaterial in the present inquiry. The real question was not who was defrauded, but who (4) committed the fraud. The allegation of the date is formal and the prosecution is not bound thereby. Plaintiff's complaint of irregularity in the process then comes to this, that the officer's preliminary investigation was insufficient to justify the proceeding by warrant of arrest.

In Hobbs v. Ray, 18 R. I. 84 (1892), the facts are not fully stated in the opinion, but from an examination of the original papers in the case, it appears the declaration alleged that defendant "maliciously intending to oppress and unjustly to imprison the plaintiff" procured the issuance of a writ of arrest in a civil action by making a false and fraudulent affidavit that the plaintiff was about to leave the State. Plaintiff was arrested and imprisoned for three days. He was then, upon his motion, discharged from arrest by the court, who found that the plaintiff had no intention of leaving the State. Later a demurrer to the declaration was sustained. It was held that an action for false imprison-

ment would not lie when the arrest is made under process wrongfully obtained but valid on its face and issued by a court of competent jurisdiction, that the gist of the action is the unlawful detention of another without his consent and malice is not an essential element of this form of action.

(5) The decision in the *Hobbs* case was followed and approved in *Lisabelle* v. *Hubert*, 23 R. I. 456; *Calderone* v. *Kiernan*, 23 R. I. 578; see also *Jastram* v. *McAuslan*, 31 R. I. 278.

In the case at bar the sheriff did not know plaintiff and there is no evidence of actual malice. The writ was regular and valid on its face and issued from a court of competent jurisdiction. Even if the investigation by the officer was insufficient, that fact did not make the process invalid. At most the officer was guilty of negligence. This does not invalidate the process and plaintiff's remedy, if any, is by action for malicious prosecution.

We come now to the counts for malicious prosecution. Public policy requires the exposure of crime and punishment of the criminal. It is the duty of the citizen to give notice to the authorities of the commission of crime, and of the officers of the State to investigate and prosecute in proper cases. For these reasons it is generally held, as stated in Fox v. Smith, 26 R. I. 1, that actions for malicious prosecution are not favored in the law and clear proof of malice and want of probable cause are required to establish a cause of action. But a charge of crime should not be lightly made (6) and in the consideration of the testimony we are not unmindful that an innocent man has been subjected to imprisonment and the temporary disgrace thereof. As the facts are not in dispute, the question of probable cause is one of law. We think there was not sufficient evidence to warrant the submission of the case to a jury.

In Wells v. Jordan, 20 R. I. 630, the general rule was approved that an officer may arrest without a warrant on reasonable suspicion, founded either on his own knowledge or on information from others, that a felony has been committed. To justify him in acting on information it must

come from creditable persons. In the case at bar a felony had been committed. The officer did not attempt to arrest on suspicion without a warrant, but only proceeded after he had made a rather extensive investigation and had received information from persons whose credibility is not questioned. He believed that plaintiff was guilty. This in itself is not a defence, but if such belief was an honest and reasonable belief and not one arising from some mental pecularity and error of defendant himself, it is a valid defence. Movery v. Whipple, 8 R. I. 360. We think the officer had reasonable grounds to believe plaintiff was probably guilty.

The question is, was there sufficient evidence to warrant the district court in finding that defendant was probably (8) guilty (Sec. 19, Chap. 281, Gen. Laws) and in binding him over to await the action of the Grand Jury? There is nothing to indicate that the officer failed to make a full and fair statement of the case to his attorney. His attorney, if he discharged his duty properly, must have passed judgment not only on the results but also on the sufficiency of the investigation made by the officer. Having stated the case fairly to his counsel, and having acted in good faith on the advise of counsel, the officer is not liable for malicious prosecution. Bartlett v. Brown, 6 R. I. 37; King v. Colvin, 11 R. I. 582; Newton v. Weaver, 13 R. I. 616; Goldstein v. Foulkes, 19 R. I. 291; St. Pierre v. Warner, 24 R. I. 295.

All of plaintiff's exceptions are overruled and the case is remitted to the Superior Court with instructions to enter judgment on the verdict.

Curran & Hart, for plaintiff.

Green, Hinckley & Allen, for defendant. John R. Wilcox, Abbott Phillips, Clifford A. Kingsley, of counsel.

Benjamin W. Grim, for Everett E. Jones.

WILHELMINA ROY vs. LEVI J. ROY.

MARCH 24, 1922.

PRESENT: Sweetland, C. J., Vincent, Stearns, Rathbun, and Sweeney, JJ.

(1) Divorce. Neglect to Provide. Temporary Allowance.

Where a respondent in a divorce petition applied for and received an allowance by order of the court, from her husband, she cannot thereafter claim in a petition brought by her, for divorce, after dismissal of the petition of the husband, that the husband neglected and refused to furnish her with necessaries during the period covered by such payments.

Divorce. Heard on exception of respondent and sustained.

VINCENT, J. On March 20, 1920, Wilhelmina Roy filed her petition in the Superior Court against her husband, Levi J. Roy, praying for a divorce from bed and board and from future cohabitation, and for an allowance for support and maintenance until such time as the parties should become reconciled.

The petition was heard in the Superior Court and a decision rendered for the petitioner granting her a divorce from bed and board and future cohabitation with the respondent, &c. The case is now before us upon the respondent's exceptions: (1) To the refusal of the trial court to dismiss the petition; (2) to the refusal of the court to admit certain testimony offered by the respondent; and (3) to the decision of the trial court granting the prayer of the petition.

It appears that the marital discords and dissensions of this couple have been brought to the attention of the Superior Court upon two previous occasions. In July 1914, the respondent here filed a petition for divorce which was heard and denied. On February 8, 1919, he filed another petition which was also heard and denied.

In connection with the last-mentioned petition of Levi J. Roy, the respondent, now the petitioner here, filed a motion for an allowance for support and for witness and counsel fees. After a hearing "on oral testimony and

agreements of counsel" a decree was entered, March 1, 1919, ordering the petitioner to pay to the respondent certain sums of money including fifteen dollars per week for her support beginning on March 3, 1919.

On July 10, 1919, this second petition of Levi J. Roy was denied and dismissed. It is undisputed that Mrs. Roy received fifteen dollars per week between March 3, 1919, and July 10, 1919, in accordance with the terms of the decree before referred to.

There is some contention now, in the case at bar, as to whether the payments of Mr. Roy in the prior suit were voluntary or involuntary. The respondent claims that they were voluntary and therefore were like any other expenditures for the benefit of the petitioner. On the other hand the petitioner claims they were involuntary and that the time covered thereby is available to her in calculating the period of the respondent's failure to supply necessaries. They were evidently made in pursuance of a decree of the Superior Court following and based upon the motion of the respondent in that case for an allowance. How far the parties through their respective counsel may have consented to the form and provisions of the decree does not appear but we see nothing in the papers in that case which would lead us to characterize such payments as "voluntary."

However it does not seem to us to be material whether such payments were made voluntarily or under the compulsion of the decree. They were made, and the advantages arising therefrom to Mrs. Roy would be the same in either case. It was within her discretion to apply for the allowance or to refrain from doing so. Having chosen to make the application and having received the money paid by her husband, we do not think that she can now claim that he has neglected and refused to furnish her with the necessities of life during the period covered by such payments.

The present petition, filed March 20, 1920, alleges the failure of the respondent to furnish necessaries for more than one year prior thereto, that being the minimum period

required by the statute in such cases. This is in effect an allegation that the respondent has neglected to provide for her support since March 20, 1919. But from March 3, 1919, to July 10, 1919, the petitioner was receiving fifteen dollars per week from her husband for her support under the order and decree of the Superior Court.

We think that the present petition was prematurely filed and for that reason it should have been dismissed.

The exception of the respondent to the decision of the trial justice granting the petitioner a divorce from bed and board and future cohabitation is sustained.

The petitioner may appear before this court, if she shall see fit, on April 3, 1922, at ten o'clock A. M., and show cause, if any she has, why an order should not be made remitting the case to the Superior Court with direction to dismiss the petition.

Pettine & De Pasquale, for petitioner.
Walling & Walling, Cooney & Cooney, for respondent.

JULIUS NASS vs. ANNIE L. GARNISS.

MARCH 29, 1922.

PRESENT: Sweetland, C. J., Vincent, Stearns, Rathbun, and Sweeney, JJ.

- (1) Landlord and Tenant. Notice to Quit.
- No particular form of notice is necessary to terminate a tenancy. The notice will be sufficient if it is in writing and informs the tenant that he is required to vacate the premises at the end of his term and is given before the commencement of the latter half of his term. It need not state when the term ends, as a tenant for a term must be presumed to know when his term commences and when it ends.
- (2) Landlord and Tenant. Notice to Quit. Time.
- The fact that a tenant who was notified to quit "at the end of your occupation month which will occur next after the expiration of fifteen days from the date hereof" was entitled to sixteen days' notice is of no importance where as a matter of fact the time given was sufficient, to comply with Gen. Laws, 1909, cap. 334, § 4.

TRESPASS AND EJECTMENT. Heard on exceptions of plaintiff and sustained.

RATHBUN, J. This is an action of trespass and ejectment to recover possession of a certain tenement occupied by the defendant as a tenant of the plaintiff from month to month. The case is before this court upon the plaintiff's exception to the ruling of the justice of the Superior Court who presided at the trial nonsuiting the plaintiff.

The plaintiff bases his claim of right to possession upon a written notice to vacate which he served upon the defendant for the purpose of terminating the tenancy.

Said notice was as follows:

"Newport, Rhode Island October 13th, 1920.

Mrs. Annie I. Garniss,

314 Broadway, Newport, Rhode Island.

MADAM:—Whereas you as tenant from month to month now hold of the undersigned a tenement or apartment known as and numbered 314 Broadway, in said Newport, Rhode Island and whereas the undersigned is desirous of terminating said tenancy, you are hereby notified to vacate and deliver possession of said tenement or apartment at the end of your occupation month which will occur next after the expiration of fifteen days from the date hereof.

Julius Nass."

General Laws, 1909, Chapter 334, Section 4, provides that "Tenants by parol of lands, buildings, or parts of buildings, for any term less than a year, shall quit at the end of the term upon notice in writing from the landlord given at least half the period of the term, not exceeding in any case three months, prior to the expiration of the term."

It was the plaintiff's intention in giving said notice to avail himself of the provisions of said Section 4 by giving the defendant a notice equal to "at least half the period of the term." The plaintiff had occupied the tenement for several months as a tenant from month to month, but the term which the plaintiff sought to terminate commenced

October 1, 1920. Said notice was served October 13, 1920. The nonsuit was based on a ruling of said justice that said notice directed the defendant to vacate not at the end of her term but before the end thereof, that is, October 28, 1920. Said justice construed said notice to require the defendant to vacate on the expiration of fifteen days from the date of the notice. We do not think the language of said notice (1) is susceptible of such construction or that the defendant could reasonably have had any doubt as to the time when she was required by the terms of the notice to vacate. particular form of notice is necessary to terminate a tenancy. The notice will be sufficient if it is in writing and informs the tenant that he is required to vacate the premises at the end of his term and is given before the commencement of the latter half of the term. The notice need not state when the term ends as a tenant for a term must be presumed to know when his term commences and when it ends. language of the notice material for our consideration is as follows: "vacate . . . at the end of your occupation month which will occur next after the expiration of fifteen days from the date hereof." The antecedent of the relative pronoun "which" is unquestionably the noun "end." Said notice contains a direction to vacate "at the end" (of your occupation month) "which will occur next after the expiration of fifteen days from the date hereof." The occupation month commenced October 1, 1920, and ended at midnight October 31, 1920. Said notice was served October 13, 1920. The "end" (of your occupation month) which occurred "next after the expiration of fifteen days" occurred at the end of the thirty-first day of October, 1920. A tenant has a right to occupy during the full period of the term. defendant had a right to remain in possession of said tenement during the whole of the last day of October, 1920. Waters v. Young, 11 R. I. 1. Said notice directed the defendant to vacate not during her term but at the end thereof, that is, on the day succeeding the last day of the term.

There being thirty-one days in the month of October and as the term ended on the last day of said month, the defendant was entitled to a notice of sixteen days instead of fifteen, as implied by said notice, but this error is of no importance. See *Congdon* v. *Brown*, 7 R. I. 19. The defendant received a notice of more than sixteen days and a notice more than equal to one-half of the period of the term. In our opinion said notice was sufficient to terminate the tenancy.

The plaintiff's exception is sustained and the case is remitted to the Superior Court for a new trial.

Jeremiah A. Sullivan, for plaintiff. Max Levy, of counsel. Frank F. Nolan, John H. Nolan, for defendant.

MELKON SEMONIAN vs. JAMES PANORAS.

APRIL 3, 1922.

PRESENT: Sweetland, C. J., Vincent, Stearns, Rathbun, and Sweeney, JJ.

- (1) Direction of Verdict.
- A verdict should not be directed for the defendant if on any reasonable view of the testimony, the plaintiff can recover, especially where the burden of proof is on the defendant.
- (2) Evidence.
- Where it appeared that witness was the purchaser of her husband's store at a mortgagee's sale, and a machine, the subject of the action, was neither mortgaged nor included in the sale, question as to the purpose of putting the store in the name of witness, was immaterial and properly excluded.
- (3) Actions. Charge. Lessor and lessee.
- Where the plaintiff as lessor of a chattel might properly maintain an action for its conversion, charge that the lessee could also maintain the action was not prejudicial to the defendant.
- (4) Trespass. Principal and Agent.
- A trespesser cannot relieve himself from liability by showing that a third person directed, ordered or authorized him to do the illegal act complained of.

TRESPASS. Heard on exceptions of defendant and over-ruled.

SWEENEY, J. This is an action of trespass de bonis asportatis to recover the value of a popcorn machine. After

a trial in the Superior Court the jury returned a verdict for the plaintiff in the sum of \$627.87. The defendant's motion for a new trial was denied and he has duly prosecuted his exceptions to this court.

It appears from the record that the writ was issued August 14, 1918, and was duly filed in court with a declaration containing two counts, one alleging trespass de bonis and the other trover and conversion of a popcorn machine. The defendant filed a plea of the general issue, and a special plea stating that when he committed the alleged trespass it was by leave and license of the plaintiff first given and granted. The plaintiff filed a replication denying the averments of this special plea.

During the trial of the case and after the defendant had introduced the testimony of one witness, he was given permission by the court to withdraw his special plea of leave and license, against the objection of the plaintiff, and the trial proceeded under the plea of the general issue.

At the close of the testimony the defendant made a motion for the direction of a verdict in his favor on the ground that the plaintiff did not have possession of the machine at the time of the trespass. The court denied this motion and its denial is the defendant's first exception.

The testimony for the plaintiff tended to prove that he was the owner of the machine with the right of immediate possession; that he had constructive possession of it while it was in the actual possession of his brother; and that against said brother's protest the defendant took possession of the machine and sent it to Agnes Semonian. The testimony for the defendant tended to prove that the plaintiff had sold the machine to said Agnes Semonian and that the defendant, while acting as her agent and with the help of the plaintiff's said brother, sent the machine to her. Upon this conflicting evidence it would have been error for the court to have directed a verdict for the defendant for it is settled that a verdict should not be directed for the defendant if, (1) on any reasonable view of the testimony, the plaintiff can

recover. Baynes v. Billings, 30 R. I. 53; Reddington v. Getchell, 40 R. I. 463; especially in this case where the burden of proof was on the defendant to justify the taking, Collier v. Jenks, 19 R. I. 493; Shibley v. Gendron, 25 R. I. 519. The defendant's exception to the denial of his motion for the direction of a verdict is overruled.

Another exception claimed by the defendant is to the exclusion of his question, "What was the purpose of putting the store in your name?" asked of his witness Agnes Semonian. It appeared in evidence that the witness was the purchaser of her husband's store at a mortgagee's sale (2) of the same and that the popcorn machine was neither mortgaged nor included in the sale. This being so, the question excluded was immaterial and irrelevant and the exception is not tenable.

The defendant claims two exceptions to that portion of the charge relating to the legal effect of the lease of the machine by the plaintiff to his brother, wherein the trial justice said, "The lessee doesn't come in here and dispute the title; someone else does. And where there is a taking of this kind, a case could have been brought either by the lessor, that is by Melkon, or by his brother. Of course both of them had a property in it. One had a general property, as it is called; one had a special property; and as long as those two don't disagree, it is proper for the lessor to bring this suit for him."

The defendant claims that it was error for the court to charge that the action could have been brought either by the lessor or the lessee. This claim of error is based upon the assumption that the lessee was in possession of the machine under a lease for a definite term when it was taken, August 7, 1917, by the defendant and sent to Agnes Semonian. This assumption is not justified by the evidence for although it appeared that the plaintiff had leased the machine to his brother, Baghdasar, February 21, 1917, for a definite term, it also appeared that in the following April the defendant took possession of it when he foreclosed the mortgage which

he held upon Baghdasar's store. The lease required the lessee to take good care of the machine and not to underlet it, and gave the lessor the right to take possession of the same for breach of any condition. Soon after the defendant took the machine from the lessee, the plaintiff brought an action of replevin against the defendant to recover possession of it and April 21, 1917, the defendant signed an affidavit in which he stated that he made no claim to the machine and that the plaintiff might take judgment for it against him.

The bringing of the action of replevin by the plaintiff was an election on his part to recover possession of the machine discharged from the lease as well as from any claim of the defendant. Baghdasar Semonian never had possession of it as lessee after this time. He appeared as a witness for the plaintiff and made no claim to the machine under the lease. The machine was left in the store of Agnes Semonian from April 27 until the following August, when it was taken therefrom by the defendant soon after he foreclosed his mortgage upon her store. She claimed that during the time the machine was in her store it belonged to her.

The vital question is whether the plaintiff (the former lessor) can maintain the action. As this court is of the opinion that he is entitled to maintain the action, that portion of the charge which was to the effect that the former lessee could also maintain the action was not prejudicial to the defendant and the defendant's exceptions thereto are overruled.

The defendant claims that he should not be held liable as a trespasser for taking the machine because he acted only as agent for Agnes Semonian. This claim is unavailing because a trespasser cannot relieve himself from liability by showing that a third person directed, ordered or authorized (4) him to do the illegal act complained of. *Donahue* v. *Shippee*, 15 R. I. 453; 26 R. C. L. 962.

The defense to this action was that on April 27, 1917, the plaintiff gave Agnes Semonian a bill of sale of the machine. The defendant and two witnesses testified to this effect and

the plaintiff denied that he had sold her the machine. This issue was submitted to the jury, under proper instructions, and their verdict in favor of the plaintiff has been approved by the trial justice. As there is sufficient evidence to support the verdict, and it does not appear that the trial justice was in error in approving it, under the established rule it will not be disturbed by this court.

All of the defendant's exceptions are overruled and the case is remitted to the Superior Court with direction to enter judgment for the plaintiff upon the verdict.

Cooney & Cooney, for plaintiff.

Hugo A. Clason, for defendant.

ELIZABETH C. GRANT vs. JAMES S. GRANT.

APRIL 6, 1922.

PRESENT: Sweetland, C. J., Vincent, Stearns, Rathbun, and Sweeney, JJ.

- (1) Divorce. Exceptions.
- In reviewing the decision of the trial court on a petition for divorce, the appellate court will not act unless the decision was clearly erroneous.
- (2) Divorce. Extreme Cruelty.
- Similar acts or conduct in different circumstances may or may not amount to cruelty Much depends on the intention of the parties, the results which follow, the habits and customs which are common to the husband and wife.
- (3) Divorce. Extreme Cruelty.
- Where respondent's acts were designed to cause distress to his wife with the apparent expectation that he would thereby be able to coerce her and compel her to live and act in every way according to his will, thereby creating a situation where it was impossible for the wife to continue to live with him without real and serious danger to her health:—

Held, that the charge of extreme cruelty was sustained.

- (4) Divorce. Condonation.
- Where after a separation relations were resumed but respondent's conduct was unchanged, and petitioner left him, such resumption was not a condonation of respondent's offence, for such forgiveness is conditional and is forfeited by further misconduct and in cases of cruelty treatment much less cruel than would be necessary to be a good ground for divorce will suffice to avoid the defence of condonation.

DIVORCE. Heard on exceptions of respondent and overruled.

STEARNS, J. This is a petition for divorce for neglect to provide and extreme cruelty. At the hearing in the Superior Court petitioner did not press the charge of neglect to provide. The petition was granted on the ground of extreme cruelty. To this decision exception was duly taken by respondent and the cause is here on his bill of exceptions.

Some other exceptions were taken to certain rulings of the trial justice but they are unimportant and require no special mention.

The question is, Was the decision of the trial justice (1) clearly erroneous? Sayles v. Sayles, 41 R. I. 170. The petitioner is a woman of middle age, who, prior to her marriage, had been a teacher in a city high school for some eighteen or nineteen years. The respondent is an electrical contractor, who does electric wiring, etc., in houses and other buildings. A part of his work was manual labor, which at times of necessity resulted in covering his clothes and body with dirt. Prior to their marriage the parties had known each other for several years, during which period, although no actual engagement existed, they had been looking forward to a marriage eventually. On several occasions they came to the conclusion that they were unsuited to each other, and for a time the intimacy ceased, only to be renewed again and finally they were married. On the evening of their wedding day they went from Providence to Boston, at which latter city they started from the railroad station to walk to a hotel. After walking a considerable distance, with their bags in their hands, petitioner complained of being tired and suggested that a taxi cab should have been secured. Thereupon respondent dropped the bags he was carrying to the sidewalk, became enraged and upbraided his wife so noisily and so long as to attract the attention of the passers-by. His wife was terrified and humiliated by his conduct and on their return to Providence, several days later, she was in a highly nervous condition and ill as a result of the fear with which her husband had inspired her. The respondent never struck her or threatened to strike her. On several occasions because of his inability to find immediately some article in the house which he wished to use, he broke out into violent and loud complaints which were heard by people outside of the house. Respondent says that he has no charge to make against his wife except in regard to her extreme particularity, as he calls it, in regard to his table manners, his clothes and his personal cleanliness. Petitioner and other witnesses testify that respondent at times often used profane language to his wife and in her presence. Respondent denies this charge. He does not claim that the other charges of his wife are false, but says they are grossly exaggerated. He apparently resented the attempt of his wife to induce him to conform to some of the elementary and fundamental usages of civilized society. He refused to change his underwear for long periods or to bathe, although his work was of such a nature as to cause him to perspire freely, with the result that his wife was at times nauseated by the odors emanating from his person. He claimed that he did take a number of baths, but did this secretly and without the knowledge of his wife. His reason for thus acting was that his wife had annoyed him by her frequent attempts to induce him to take baths. He persisted in his conduct although he knew that his wife was greatly disturbed and distressed thereby. He refused to change his working clothes before sitting down to supper, apparently intending thus to offend and vex his wife. refused to speak to friends of his wife whom she had invited to supper. In various other ways he often took the trouble to do things which had no other apparent object save to annov and humiliate his wife before her friends and rela-The aged father and mother of petitioner lived in the second story of the same house. At one time during the winter, after petitioner and respondent had quarreled.

respondent shut off the common heating plant in the cellar of the house, to the great inconvenience and suffering of petitioner's parents. Without further statement of the sordid details of this unhappy family life, we think certain conclusions are clearly to be drawn from the testimony.

Respondent's standards of decency and propriety differed from those of his wife. She was a woman of some refine-Her standards of living were not unreasonable or different from the prevailing standards. He wilfully and designedly pursued a course of conduct, both in public and private, which was calculated to and actually did distress and humiliate his wife, not once but repeatedly. tioner testifies that she became ill as a result of this conduct. Respondent claims that her illness was due to the influenza. Whatever be the fact, we think the inevitable result of the continuance of such conduct on the part of respondent would be injurious to the health of his wife. The respondent has evidently a peculiar and unfortunate disposition, in which obstinacy and self-will are prominent parts. His wife was aware of some of his peculiarities before the marriage, and she can not now justly complain of such peculiarities either of character or conduct which although unpleasant and disagreeable, do not constitute a statutory ground of divorce. The respondent's acts were not the natural expression of his idiosyncrasies, but were designed to cause distress to his wife with the expectation, apparently, that respondent would thereby be able to coerce his wife and compel her to live and to act in every way according to his wish and will. By his own wrongful acts the respondent created a situation where it was impossible for petitioner to continue to live with him without real and serious danger to her health.

The courts, wisely as we think, generally have been reluctant to attempt to make any precise legal definition of "extreme cruelty" or "cruelty." Similar acts or conduct in different circumstances may or may not amount to cruelty. Much depends on the intention of the parties, the results

which follow, the habits and customs which are common to the husband and wife. Without then attempting to formulate a definition which will cover all conceivable cases, we think the evidence in this case is sufficient to support the finding of the trial justice that respondent was guilty of extreme cruelty.

A second question remains: Was there a condonation by the wife? The parties only lived together five or six months. After the first separation petitioner and respondent attempted to live together again and marital relations were resumed. Respondent's conduct however was unchanged and petitioner left him. In the circumstances we do not think that the resumption of marital relations was a condonation of respondent's offence which bars petitioner's right. As stated in Wilson v. Wilson, 16 R. I. 122, it is a virtue for a wife to bear with her husband so long as there is any hope of his amendment. Such forgiveness or condonation is conditional however and it is forfeited by further misconduct and in cases of cruelty "treatment much less cruel than would be necessary to be a good ground for divorce will suffice to avoid the defence of condonation." See also Egidi v. Egidi, 37 R. I. 481; Sayles v. Sayles, supra.

All of the respondent's exceptions are overruled and the case is remitted to the Superior Court for further proceedings.

Fitzgerald & Higgins, for petitioner. Laurence J. Hogan, of counsel.

Curtis, Matteson, Boss & Letts. Ira Lloyd Letts, for respondent.

PROVIDENCE ICE COMPANY vs. WILLIAM E. BOWEN.

JULY 6, 1921.

PRESENT: Sweetland, C. J., Vincent, Stearns, Rathbun, and Sweeney, JJ.

(1) Sales. Submitting of offer.

Where a contract for the sale of ice to be harvested by the seller during a certain period named a minimum price and provided that in case the seller received a bona fide written offer from third parties of a greater price, the buyer was required to pay one-half of the increase or forfeit the amount of

ice for which such offer had been made, the seller was not required to submit the offer for the inspection of the buyer.

(2) Sales. Election.

Where a contract for the sale of ice to be harvested by the seller during a certain period named a minimum price and provided that buyer should pay in addition thereto one-half of the difference between such price and the price offered the seller by bona fide written offer of a third party or forfeit the ice so offered to be bought and the seller gave notice to the buyer of the receipt of offers the buyer was thereupon required to elect whether to pay the increased price or forfeit his right to the ice, although the notice did not state that the offers were bona fide and in writing, where the buyer made no objection to the form of the notice given him by seller.

(3) Trial.

In an action by a buyer for failure to deliver, following the buyer's failure to elect between paying an increased price or forfeiting the right to ice on the seller's receipt of bona fide written offers from third persons to purchase ice at an increased price, under the provision of the contract requiring him to do so, in which action it was claimed that offers which the seller claimed to have received from third persons were not in fact bona fide, instruction to the jury that seller offered to have the bona fide character of the offers ascertained by certain designated persons, and that buyer offered no constructive criticism of the bona fide character of the offers, and that seller was not asked, nor was any suggestion made by the buyer as to what such an examination should be, held not error, in view of the uncontradicted testimony.

(4) Refusal of Request to Charge.

Refusal of requested instructions based on assumption of fact not warranted by the evidence was proper.

(5) Sales.

Where a buyer had requested the seller to ship only the amount of goods requested by third persons, the buyer could not complain that the seller shipped less than the amount per day called for by the contract where the third person called for less than such amount.

(6) Sales.

Where the contract of sale of ice to be harvested by the seller during a certain period named a minimum price and provided that the buyer should pay in addition thereto, one-half the difference between such price and the price offered the seller by a bona fide written offer of a third person or should forfeit the amount of ice covered by such offer, and where the buyer on receiving the notice from the seller of such offer claimed the right to inspect the offer to ascertain its bona fide character and on the seller's refusal to submit the offer for inspection, the buyer did not elect to take the ice at the increased price, the seller was justified in concluding that the buyer did not intend to decide whether it would forfeit the ice until after it was permitted to inspect the offer.

(7) Sales.

In an action by a buyer for failure to deliver ice under the contract of sale of a portion of the ice to be harvested by the seller during a certain period, naming a minimum price and providing that the buyer should pay in addition thereto, one-half the difference between such price and the price offered by a bona fide written offer of a third person or forfeit the ice covered by such offer, in which the defense was that the buyer had forfeited the ice remaining to be delivered under the contract by his failure to elect to take the ice at the increased price on the seller's receipt of offers from third persons, a refusal to charge that the buyer was entitled to delivery of the ice not forfeited, at the minimum price, was not error where the buyer had forfeited the amount of ice remaining to be delivered under the contract.

(8) Sales.

Where a contract of sale of a portion of the ice to be harvested by the seller during a certain period named a minimum price and provided that the buyer should pay in addition thereto, one-half of the difference between such price and the price offered the seller by bona fide written offers of third persons or forfeit the ice covered by such offers, seller was not required to dispose of the ice not covered by the contract, before requiring the buyer to elect on receipt of third persons' offers.

(9) Sales.

In an action by a buyer for failure to deliver ice under a contract of sale of a portion of the ice to be harvested by the seller during a certain period, naming a minimum price, and providing that the buyer should pay in addition thereto one-half the difference between such price and the price offered by bona fide offers of third persons or forfeit the ice covered by said offers, in which the defense was that the buyer had forfeited the ice remaining to be delivered under the contract by his failure to elect to take the ice at the increased price on the seller's receipt of offers from third persons the question of whether seller had bona fide offers in writing from third persons was one of fact for the jury.

(10) Sales.

Where a contract of sale of a portion of the ice to be harvested by the seller during a certain period named a minimum price and provided that the buyer should pay in addition one-half of the difference between such price and the price named in bona fide written offers of third persons or forfeit the ice covered by such offers and where on receipt of such offers from third persons the seller had sufficient ice in addition to that covered by contract with buyer, to sell to third persons, the seller's acceptance of offer before giving buyer notice thereof did not preclude him from requiring the buyer to elect whether to pay the increased price or forfeit the ice.

Assumpsit. Heard on exceptions of plaintiff and over-ruled.

RATHBUN, J. This is an action of assumpsit to recover for an alleged failure to deliver ice in accordance with a written contract, also to recover the amount of certain alleged over-payments for ice. The trial in the Superior Court resulted in a verdict for the defendant. The plaintiff's motion for a new trial was denied by the justice who presided at the trial. The case is before this court on the plaintiff's exception to the refusal of said justice to grant said motion for a new trial, also on certain exceptions taken to the rulings of said justice during the trial.

On January 21, 1916, the parties entered into a written contract whereby the plaintiff agreed to buy and the defendant agreed to sell for a period of five years 721/2% of one-half of all ice harvested by defendant during the term of the contract and stored in the defendant's ice houses at Abbott The amount so harvested and stored Run. Rhode Island. was to be determined by measurements taken immediately The minimum price to be paid for after each ice harvest. ice was one dollar per ton. This action is the culmination of a dispute between the parties as to the interpretation of a clause of said contract, which clause reads as follows: "In the event that the party of the first part receives, in writing, a bona fide offer or offers in any year during the term of this contract, of One Dollar Fifty Cents (\$1.50) per ton, or more, F. O. B. ice houses at Abbott Run or Highland Lake, for five hundred tons or upwards, it is agreed by the party of the second part that it will pay to the party of the first part one-half of the increase in price, in addition to One Dollar (\$1.00) per ton, for so much of its ice as the party of the first part is able to dispose of at the increased price, or forfeit such an amount of said ice to the party of the first part."

The plaintiff contends that, upon receiving notice from the defendant that he had received an offer as specified in said clause, the plaintiff was not required to elect whether it would pay the extra price or forfeit the amount of ice named in said offer until the defendant had submitted said offer for the plaintiff's inspection. The defendant would at no time consent to this construction.

The controversy arose during the spring and summer of 1918. After the ice harvest of the preceding winter the ice in the Abbott Run ice houses was measured and it was determined that $72\frac{1}{2}\%$ of one-half of the ice in said houses was 7,343 tons. On March 8, 1918, the defendant wrote the plaintiff, stating, "Now in reference to the portion of ice coming to you under the contract. I have sold 1,000 tons for \$2.00 per ton, with the privilege of another 1,000. will know regarding this amount within a few days, but the first mentioned amount is positively sold. . . . I would like to know between now and Monday if you intend to pay the advance in the price, \$1.50 per ton, on the 1,000 tons which were positively sold, as stated above." To the above letter the plaintiff replied: "We ask you to permit us to see your contract for the sale of 1,000 tons of ice at \$2.00 per ton and also the contract for the sale of another 1,000 tons at \$2.00 per ton, if the latter contract is entered into by you." On March 20, defendant wrote that "there is nothing in the contract that requires me to allow you to inspect or handle any contracts which I may have. . . . Now relative to the 2,000 tons at \$2.00 per ton, I will kindly ask whether you will give \$1.50 per ton for the 2,000 or release the same." On March 26, 1918, the plaintiff replied: "... But in this connection we must say that we insist that it is clearly our right to know that you have a 'bona fide offer in writing,' etc., according to the terms of the contract. One of the ways in which that can be established is for you to show us the 'bona fide offer in writing,' and we again repeat our request that you show us the offer or offers, and we reserve all our rights with reference thereto. . . . We can only repeat what we have already said in this, namely: if you have received 'a bona fide offer in writing etc., we shall pay you an increased price for some of the Abbott Run ice we have purchased of you, all according to the contract, but we are entitled to know the facts. It is unreasonable to suppose that we may

be successfully called on to stand and deliver without proof." On April 19, 1918, the defendant replied as follows: "I note that in your favor of the 26th ult., you say that you will pay the increase for the same. That will not apply to the 2,000 tons which I have already sold, as you did not avail yourself of the right to take this at the increased price." The same letter also stated: "I received a bona fide offer some time ago for 1,400 tons of ice from Abbott Run. I want a reply as soon as possible, I would like to have you advise me, on or before Saturday night, April 20, at 6:00 o'clock p. m., if you will pay the difference as expressed in the contract or not." The plaintiff replied: "As you give us no figures as to price on this lot it would be impossible for us to reply to your question as to whether or not we 'will pay the difference as provided in the contract,' even if we were so disposed. Our position in reference to the 1,400 tons just mentioned is just the same as with reference to the other quantities mentioned in your previous favors and our replies thereto, namely: Show us bona fide offers in writing as described in the contract and we will now and at all times do just as we have agreed to do." On April 22, 1918, defendant replied: "I regret that the matter of price was overlooked in my communication of the 19th inst., to you regarding the amount of 1,400 tons of ice. The offer is for \$2.00 per ton F. O. B. Abbott Run, and from no other place. I will wait until Wednesday, April 24th, at 6:00 p. m. for a reply." On May 10, 1918, defendant wrote: "Regarding the bona fide offers for some of that portion of the ice which might be coming to you, will say that I will allow Mr. William C. Angell or Mr. A. B. Chace of the Westminster Bank to look over the offers I have received and advise your attorney, Mr. Hinckley. This is with a distinct understanding that they do not give names or addresses of parties making the offers. They may have them, however, acknowledge their signatures, if they wish to do so." It appears from the testimony that at that time Mr. Chace was president and Mr. Angell cashier of the Westminster

Bank and that Mr. Hinckley and Mr. Bowen were directors of the same bank. In a letter of May 15, 1918, the plaintiff rejected the above proposal and stated that it did not give the plaintiff the right to which they were entitled under the contract. On June 7, 1918, defendant wrote, stating that he had bona fide offers for 1,700 tons at \$2.00 per ton and requested the plaintiff to advise whether they would pay the difference in price. The letter continued as follows: "I will verify the same, if you wish me to, and place the offers in the hands of Mr. Arnold B. Chace or Mr. William C. Angell, or both if you desire, as I previously offered to in my letter to you of May 10, 1918, and which you declined to accept." Plaintiff replied, June 8, 1918: "Your offer to 'place the offers in the hands of Mr. Arnold B. Chace or Mr. William C. Angell or both' is the same offer made to us by you under date of May 10th and is subject to the same reply. . . . We have heretofore, perhaps a number of times, informed you what is necessary for you to do in order to establish this year's price, and we are still waiting for reasonable action on your part with reference thereto." In a letter of June 12, 1918, the plaintiff enclosed a check paying for the ice delivered from May 27, to June 1, 1918, at the rate of \$1.00 per ton. Plaintiff stated in this letter that if and when the defendant met the requirements of the contract and established the fact that they were indebted further they would pay such amount if any as may be found to be due. In a letter of June 28, 1918, the defendant returned said check and notified the plaintiff that he had an offer for 800 tons of ice at the price of \$2, per ton and that he was willing to refer the offer to the persons mentioned in his communication of June 7. The letter also stated that the offer for 800 tons makes a total of 5,900 tons, for which he had received offers in writing. On July 2, 1918, the plaintiff wrote that its reply relative to this offer was the same as it had made to notices concerning other offers. July 3, 1918, defendant wrote, stating that he had duly notified the plaintiff of offers in writing which he had received

for ice at the rate of \$2.00 per ton; that he had given the plaintiff every opportunity to live up to the contract; that he had offers for 5,900 tons; that the difference between the 5,900 tons and 7,343 tons was 1,443 tons; that he had shipped the plaintiff more than the latter amount; and that he would ship no ice after July 6, 1918. It was admitted at the trial that the amount shipped by the defendant was 2,358 tons. On July 9, 1918, the plaintiff's attorneys sent the defendant a letter in which it was contended that the plaintiff had performed its contract. The letter stated that failure on the defendant's part to ship ice would constitute a breach of the contract and that the plaintiff was willing to pay an increased price but must have proof that bona fide offers in writing had been made to defendant. Thereafter upon receiving a promise from Mr. Hinckley that he would not disclose the names of the persons who had made said offers for ice, the defendant delivered said written offers to Mr. Hinckley who kept them until the following day. On July 30, 1918, the plaintiff wrote, stating that without prejudice and reserving all its rights it would pay \$1.50 per ton for the ice shipped during the month of June and from July 1, to July 6, 1918, and for the balance of the ice due for the season, viz., 5,034 tons, as they contended. Said letter contained a check, in payment for ice, at \$1.50 per ton, shipped during the last five days of May, 1918. The defendant refused to ship any more ice and stated in a letter to the plaintiff that he had sold all of the remaining ice in question to the persons who had submitted offers to The plaintiff thereafter paid for the ice shipped from June 1, to July 6, 1918, at the rate of \$1.50 per ton.

Plaintiff's 12th exception was taken to the ruling of the court that said contract did not require the defendant to submit to the plaintiff said bona fide offers before the plaintiff (1) was required to elect whether it would forfeit the amount of ice specified in the offers or pay the increased price for said ice. The plaintiff in its brief cited a number of authorities to the effect that when the language of a contract is obscure,

ambiguous or contradictory the court will if possible adopt that construction which establishes a comparatively equitable contract rather than one which places one of the parties entirely at the mercy of the other. The plaintiff suggests that unless the defendant was required to submit said offers to the plaintiff it would have been possible for the defendant, when he had received no offers, to have reported that he had received a bona fide offer in writing at a price equal to or in excess of \$1.50 per ton and by such fraud require the plaintiff to elect whether it would forfeit the amount of ice specified in such pretended offer or pay the additional price.

The plaintiff and the defendant were rivals in business. No other wholesale ice dealer had a business located either in the city of Providence or within ten miles from said city and while the plaintiff was suspicious as to the genuineness of said offers the defendant suspected that the plaintiff, if it knew the name of his customer, would induce such customer by offering to sell him ice at a lower price, to withdraw his offer. There is testimony to the effect that the plaintiff before said contract was executed had learned the names of some of the defendant's customers and had induced them, by underbidding the defendant, to purchase their supply of ice from the plaintiff. It is evident that the construction placed on said contract by the trial court might work a hardship on the plaintiff and also that the construction contended for by the plaintiff might give it an unfair advantage over the defendant.

The contract was carefully prepared. Several drafts with varying provisions were submitted to the defendant before the final draft was executed. The plaintiff does not contend that it was orally agreed that said offers would be submitted to the plaintiff but that the court should construe said contract to mean the same as it would mean if a provision requiring said offers to be submitted to the plaintiff had been inserted in said contract. We are of the opinion that the language of said contract is not obscure, ambiguous

or contradictory and that the court would not be warranted

in reading into said contract the words "and submit said offer or offers to the party of the second part." 13, Corpus Juris, at page 524, states the rule as follows: "The intention (2) of the parties is to be deduced from the language employed by them, and the terms of the contract, where unambiguous, are conclusive, in the absence of averment and proof of mistake, the question being, not what intention existed in the minds of the parties, but what intention is expressed by the language used. When a written contract is clear and unequivocal, its meaning must be determined by its contents alone; and a meaning cannot be given it other than that Hence words cannot be read into a contract expressed. which import an intent wholly unexpressed when the contract was executed. Where the contract evidences care in its preparation, it will be presumed that its words were employed deliberately and with intention." See Lewis Pub. Co. v. Greene, 40 R. I. 309; Hassett v. Cooper, 20 R. I. 585; Harrington v. Law, 90 Atl. (R. I.) 660; Richmond v. N. Y., N. H. & H. R. R. Co., 26 R. I. 225. The plaintiff's 12th exception is overruled.

Exceptions 28, 30, 31, 52, 53 and 57 each presents the same question as exception 12 and each is overruled.

The 24th and 25th exceptions were taken to the ruling of the court refusing to strike out testimony of certain witnesses. Each of said exceptions is without merit and is overruled.

The 35th exception was taken to the refusal of said justice to grant the plaintiff's 1st request to charge, which request was as follows: "That under the contract the defendant was required to notify the plaintiff that he had bona fide offers in writing if he desired to take advantage of the same." As the defendant, in some of his letters, notifying the plaintiff that defendant had received offers for some of said ice, failed to state that said offers were bona fide and in writing, the plaintiff contends that it was not required to elect whether it would forfeit the amount of ice specified in said letters or

pay the increased price and that by refusing to elect it did not forfeit any of the ice specified in said letters. In making this contention the plaintiff relies upon the following language of the contract: "In the event that the party of the first part receives, in writing, a bona fide offer or offers in any year during the term of this contract of One Dollar Fifty Cents (\$1.50) per ton, or more F. O. B. ice houses at Abbott The plaintiff knew when it received notice of each of said offers that the notice was given for the purpose of requiring the plaintiff to elect in accordance with the terms of the contract whether the plaintiff would forfeit the amount of ice specified in the notice of offer or pay the increased price. From the correspondence between the parties it is clear that the language of said letters did not mislead the plaintiff. It made no objection to the form of notice but demanded that the offers be submitted for the plaintiff's inspection. The 35th exception is overruled.

Exceptions 26, 29, 32 and 36 to 40 inclusive each presents the same question as does Exception 35. Each of these exceptions is overruled.

The 54th exception is to a ruling modifying the plaintiff's 24th request to charge, which request was as follows: "That under the terms of the contract the plaintiff upon notification by the defendant that he had bona fide offers in writing for certain of the ice was entitled to have either the offer or offers themselves presented to it or proper proof of the same presented to it before it was obliged to notify the defendant whether it would take the ice contained in the offer or offers at the increased price or forfeit the same." The trial court, after giving the charge as requested, added the following: "I instruct you in regard to that it was the duty of the defendant to meet the plaintiff properly for the purpose of ascertaining whether these were bona fide offers but in this case I find that the defendant did make offers to have it determined as to whether they were bona fide or not and that the plaintiff offered no constructive criticism of the offers that the defendant had made. So I instruct you that

while it may have been the duty of the defendant to submit to some fair method of determining whether these were bona fide or not, that he was not asked nor was any suggestion made by the plaintiff as to what such examination should be." The court was referring to testimony which was not only uncontradicted but was true. in which the defendant offered to refer the written offers for ice to Mr. Angell or Mr. Chace were introduced in evidence by the plaintiff. That the court in a charge may refer to such testimony see Podrat v. Narragansett Pier R. R. Co., 32 R. I. at 264. We find no impropriety in the statement of the court that "the plaintiff offered no constructive criticism of the offers (to refer offers for ice to Messrs. Angell and Chace) that the defendant had made." The plaintiff does not even suggest that it made any constructive criti-The 54th exception is overruled.

Exception 33 presents the same question as Exception 54 and is overruled.

The 68th exception is without merit and is overruled.

Exceptions 69 and 70 each presents substantially the same question as Exception 12 and each is overruled.

Exception 41 is to the ruling of the trial court modifying the plaintiff's 8th request to charge. Exception 42 is to the ruling modifying the plaintiff's 9th request to charge.

(4) Exception 43 is to the ruling denying the plaintiff's 10th request to charge. The evidence does not warrant the assumption of fact upon which each of said requests, 8, 9 and 10, was based. Exceptions 41, 42 and 43 are overruled.

The 34th exception is to the ruling of the trial court modifying the plaintiff's 40th request to charge, which request was as follows: "That under the contract the plaintiff was entitled to three carloads of ice daily, and if the jury find that they did not receive three cars daily they may consider this a breach of the contract and the jury may assess such damages as they may find to be due because of such breach." After reading said request to the jury, the court said: "You are so instructed except that if the

official of the Ice Company spoken of in the testimony of Mr. Bowen as a fact told Mr. Bowen that he would take his instructions as to what deliveries he should make from the Boston concern and in pursuance of such authority to take these instructions, the amount was reduced, then of course he would not have been called on to ship three cars a day. . . . If you find it was an impossibility, not through his own act but through the act of the railroad, being unable to furnish him three cars a day to load, then of course you might consider that in figuring the amount that he would be required to ship, because this intervening agency came in and this contract must have been made with the knowledge that the railroad had to take the material." If the plaintiff directed the defendant to ship only the amount of ice requested by the Boston Ice Company and the defendant in compliance with said Ice Company's request shipped less than three cars per day the plaintiff has no cause for com-The contract required the plaintiff to pay all freight and did not require the defendant to deliver ice at the place of business of the plaintiff or its customers but only on the cars at defendant's ice houses. The 34th exception is overruled.

The 66th exception presents the same question as the 34th exception and is also overruled.

The 64th exception is without merit and is overruled.

The 63rd exception is to a ruling modifying the plaintiff's 34th request to charge, which was as follows: "That if the plaintiff within a reasonable time after receipt of notification from the defendant that he had so-called bona fide offers in writing for ice notified the defendant that it would take the ice and would not forfeit it and would pay the increased price if the offers were in fact genuine, the plaintiff fully complied with the terms of the contract in this respect, and whether the plaintiff would be obliged to pay an increased price or not would depend upon later proof as to the genuineness of the offers." After reading said request the court said: "I so instruct you, with this exception,—unless this

notice was coupled with unreasonable demands requiring the defendant to do something which, under the terms of the contract, he was not required to do." While in some of its letters the plaintiff did state that it would not forfeit the ice, the statement was coupled with a demand that the offers be presented for the plaintiff's inspection. The plaintiff at no time without equivocation "notified the defendant that it would take the ice and would not forfeit it and would pay the increased price if the offers were in fact genuine." On June 8, 1918, in reply to the last notice which the defendant gave that he had received offers in accordance with the provisions of the contract the plaintiff wrote:

"We beg to acknowledge receipt of your favor of the 7th inst. in which you say you 'have bona fide offers for 1,700 tons of that portion of the ice coming to you (us) from Abbott Run, etc., and asking us whether or not we 'will pay the difference in price as expressed in that contract.'

"Replying thereto we beg to assure you that we will pay any 'difference in price as expressed in that contract' not only for the 1,700 tons just mentioned, but for any and all of our portion of the Abbott Run ice, and will do so whenever the price to be paid by us is properly established under the terms of the contract referred to.

"We do not admit the correctness of your statement that 'the above offer covers more than the balance of the ice coming to you' (us).

"Your offer to 'place the offers in the hands of Mr. Arnold B. Chace or Mr. William C. Angell or both' is the same offer made to us by you under date of May 10th and is subject to the same reply as made to you by us under date of May 15th.

"We ask your attention to the following closing paragraph in our letter to you May 28th:

"'We have heretofore, perhaps a number of times, informed you what is necessary for you to do in order to establish this year's price, and we are still waiting for reasonable action on your part with reference thereto.'"

In the above letter plaintiff states that it will pay the increased price "whenever the price to be paid by us is properly established under the terms of the contract referred to," but the letter clearly shows that the plaintiff was still contending that the price could be "properly established under the terms of the contract," only by submitting the offers for the plaintiff's inspection. The plaintiff contended that the contract gave the plaintiff the right to refuse to elect whether it would forfeit the ice, until after the offers were submitted for the plaintiff's inspection but this contention, as we have already pointed out, was untenable. The plaintiff relied upon its construction of the contract and did not elect to take the ice. It was necessary for the defendant in the proper management of his business either to accept or reject, within a reasonable time, the offers which he received and we think he was justified in concluding, notwithstanding the plaintiff's statements that it would not forfeit the ice, that the plaintiff did not intend to decide whether it would forfeit the ice until after the plaintiff was permitted to inspect the offers. In our opinion the trial court did not err in modifying the plaintiff's 34th request to charge. The 63rd exception is overruled. 55th exception presents the same question as the 63rd exception and is overruled.

The 58th exception is without merit and is overruled.

The 49th exception is to the refusal of the trial court to grant the plaintiff's 19th request to charge. Said request was based on a misstatement of the evidence. The 49th exception is overruled.

The 50th exception is to the refusal of the court to grant plaintiff's 20th request to charge, which request was as follows: "That if the jury find that some of the ice was forfeited, then the balance of the ice which was not forfeited (7) and which the plaintiff did not agree to pay for at the rate of \$1.50 per ton could be charged only at the rate of \$1.00 per ton." The plaintiff received 2,358 tons of ice. There was evidence to the effect that the plaintiff had forfeited all

ice which according to the terms of the contract the defendant had agreed to deliver except 1,443 tons and the jury evidently found that the plaintiff had forfeited all of said ice which the defendant, by the terms of the contract, had agreed to deliver except 1,443 tons. If all of the ice except 1,443 tons was forfeited, the plaintiff, having received 2,358 tons, received 915 tons of ice more than the contract gave the plaintiff the right to demand. There is no evidence that the payments for ice amounted to more than \$1.00 per ton for 1.443 tons and the fair market value of 915 tons. The court gave the substance of said request in charging as follows: "There is a statement that they paid \$1.50 for some ice. Well, if they did and it shouldn't have been \$1.50 and it was an overpayment, by mistake or by claiming to be bona fide and it wasn't bona fide—the company would be entitled to have back 50 on each ton." The 50th exception is overruled. The 51st exception is to the refusal of the court to grant

plaintiff's 21st request to charge, which was as follows: "That under the terms of the contract the defendant could not require the plaintiff to pay an increased price for the ice covered by the contract or forfeit any of said ice until all of the defendant's ice in the Abbott Run ice house was first sold by him, and in this case, as the defendant has offered no evidence that he had in fact sold all of his half of the ice in the ice house before he received, as he says, bona fide offers he cannot claim that the plaintiff is in default." contract in no way provides as to how or when the defendant shall dispose of the portion of his ice which he did not agree to sell the plaintiff. Nothing is contained in the contract to prevent the defendant from entirely withholding his half of the ice from the market. The defendant's half of the ice was no part of the subject of the contract between the parties. As this court said in Richmond v. N. Y., N. H. & H. R. R. Co., 26 R. I. at 227, "We can not conceive that it could have been in the minds of the parties thus to limit the operation of the contract, without some express words to that effect." See also 13 Corpus Juris p. 524. In no one of the numerous letters written by the plaintiff insisting that the written offers be submitted to the plaintiff was it suggested that the contract required the defendant to dispose of all of his half of the ice before he had the right to require the plaintiff to elect whether it would forfeit the ice specified in the notice of offer or pay the increased price. See *Hassett v. Cooper*, 20 R. I. 585. The 51st exception is overruled.

The 27th exception is to the ruling of the court refusing to direct a verdict for the plaintiff. The plaintiff never elected to take the ice. Whether the defendant had bona (9) fide offers in writing was clearly a question of fact for the jury. The 27th exception is overruled.

The 71st exception is to the refusal of the trial court to grant the plaintiff a new trial. The plaintiff argues that a portion of the ice was sold before the plaintiff had an opportunity to accept or reject it. The testimony was conflicting upon this issue. If the defendant did accept an offer of \$2.00 per ton for ice before giving notice to the plaintiff that he had received said offer the defendant did not thereby deprive himself of the ability to perform his part of the contract with the plaintiff. He requested the plaintiff to elect whether it would forfeit the amount of ice specified in said notice or take said amount of ice at the increased price. If the plaintiff had elected to take said amount of ice the defendant could have supplied both customers. Said written contract gave the plaintiff the (10) right to receive, by complying with the terms of said contract 7,343 tons of ice from the defendant's said ice houses but the plaintiff was not entitled to receive any specific ice which had been separated from other ice of the defendant The question was submitted to the jury in said ice houses. with proper instructions. The justice who presided at the trial has refused to grant a new trial and we find no reason for disturbing the verdict of the jury which has been approved by the trial court. The 71st exception is overruled.

The 62nd and 65th exceptions are without merit and are overruled.

We have examined each of the plaintiff's exceptions and find each of them to be without merit.

All of the plaintiff's exceptions are overruled and the case is remitted to the Superior Court with direction to enter judgment upon the verdict.

Green, Hinckley & Allen, for plaintiff.

Frank L. Hinckley, Abbott Philips, Clifford A. Kingsley, of counsel.

McGovern & Slattery, for defendant.

John H. Slattery, of counsel.

G. W. McNear, Inc. vs. American & British Mfg. Company.

JANUARY 6, 1922.

PRESENT: Sweetland, C. J., Vincent, Stearns, and Rathbun, JJ.

- (1) Contracts. Guaranties.
- Where one party to a contract waived the furnishing of guaranties of its performance by the other party, the latter cannot as a defence to an action by the former for its breach, set up such waiver by the plaintiff, where the plaintiff accepted the agreement without guaranties and acted in reliance upon the defendant's sole undertaking.
- (2) Evidence. Conversation by Telephone.
- The action of the court in admitting and rejecting testimony as to telephonic conversations, dependent upon the evidence of the identity of the party at the other end of the wire was proper.
- (3) Evidence. Reversible Error.
- The action of the court in excluding evidence should not be regarded as reversible error, where the court permitted such excluded statements appearing in a subsequent portion of the deposition to be presented to the jury.
- (4) Conspiracy to Create Monoply. Evidence.
- Where the admitted purpose of defendant was to obtain a monopoly of a commodity with the object of selling it at an artificially advanced and unreasonable price, and the sole controversy between the parties was whether the plaintiff acting through its agent knew of the ulterior purpose of the defendant and illegally combined with it to carry out such purpose or whether the plaintiff was merely pursuing its ordinary business as a commission broker without participation in the design of defendant, evidence offered by defend-

ant as to acts and statements of its agent in corroboration of the admitted designs of the agent and the defendant, but in no way tending to support defendant's contention of an illegal combination with the plaintiff to further such designs, was irrelevant and inadmissible.

(5) Conspiracy to Create Monoply. Evidence.

Upon the issue of a conspiracy to create a monopoly, the determination as to the admissibility of evidence as to the acts and declarations of one of the parties rested in the discretion of the court. If there was evidence in the case from which a jury might possibly draw the inference that a conspiracy existed between the parties the court would be obliged to submit the question to the jury even though such inference would not be drawn by him and although he might feel that a verdict finding a conspiracy would be against the preponderance of the evidence and should be set aside, and in the state of the proof in the case at bar the justice could properly exercise his discretion and exclude evidence as to the acts and declarations of one of the parties although he felt constrained to submit the question of conspiracy to the jury.

(6) Evidence. Cross Examination.

It is within the discretion of the court to regulate and restrain cross examination designed to test or discredit the sincerity of a witness.

(7) Contracts. Anticipatory Breach. Damages.

Plaintiff obligated himself to receive from X. and to pay him for forty flasks of quicksilver per month for six months. Plaintiff assigned the contract to defendant but there was no novation and plaintiff continued bound upon his contract. Defendant was in default and repudiated its obligation under the agreement of assignment. Held, that plaintiff was entitled to treat such renunciation as a breach of the entire agreement and to commence his action before the termination of the period within which the full deliveries were to be made.

Held, further, that in measuring the plaintiff's damages the jury should consider not only his loss upon the amount of the quicksilver which he was obliged to receive before the defendant's breach of the contract and before the commencement of the action but also his loss in respect to the quicksilver delivered under the contract subsequent to the date of the writ.

Held, further, that it appearing that the commodity had no value to the plaintiff for its own use and that to reduce the amount of its loss and to mitigate the damages the plaintiff had with due diligence and after proper notice sold the quicksilver from time to time at auction, evidence as to the amounts received at such sales was admissible to assist in fixing the plaintiff's damages.

(8) Contracts. Principal and Agent. New Trial.

The court would not be warranted in setting aside a verdict because of refusal of the trial court to submit to the jury the question whether defendant's agent against instructions delivered the defendant's executed agreement to the plaintiff, where the overwhelming preponderance of the evidence was against the fact that plaintiff had knowledge of the instructions at the time of the delivery to him of the agreement and where at the time of delivery

defendant's agent also furnished plaintiff with a certified copy of a resolution of defendant's directors authorizing the chairman of the board to sign the contract.

(9) Special Findings.

Gen. Laws 1909, cap. 291, § 6, relative to the submission of special findings to the jury, relates to the submission of questions involving some material issue in a case and not to what is merely a controverted point in evidence.

(10) Special Findings.

The material issue in a case was whether the plaintiff and defendant had combined to obtain a monopoly with the unlawful intent of selling a commodity at an unreasonably high price; requests for special findings as to whether defendant's agent was endeavoring to get control of a sufficient quantity of the commodity to enable him to raise the price and whether plaintiff's agent was working with the defendant's agent to this end; were refused:—The jury were instructed that both parties were bound by the acts purposes intent and knowledge of their agents.

Held, that the moving party was not prejudiced for the issue stated was the particular matter in controversy and was clearly explained in the charge and the question must have been intentionally answered in the general verdict.

(11) Trial. Misconduct of Counsel. Exceptions.

A bill of exceptions may not include objections to the conduct of counsel in the trial of a case, except where the party has asked the court for appropriate action which has been denied when by exception to such denial of relief he may bring the ruling up for review.

Assumpsit. Heard on exceptions of defendant and overruled.

SWEETLAND, C. J. This is an action of the case in assumpsit to recover damages for the alleged breach by the defendant of two written agreements.

The case was tried in the Superior Court before Mr. Justice Brown sitting with a jury and resulted in a verdict for the plaintiff in the sum of \$138,422.63. The defendant duly filed its motion for a new trial which was denied by said justice. The case is before us upon the defendant's exception to the decision denying its motion for new trial, and upon the following exceptions taken by the defendant in the course of the trial upon which it now relies.

The case has been in this court before upon a bill of exceptions following a previous trial in the Superior Court

and in our opinion filed at that time the essential facts are set forth (42 R. I. 302). The evidence in the trial now in review is substantially the same as that presented at the previous trial. By reference to the transcript the following facts appear. Quicksilver, used in making fulminate of mercury, is an essential ingredient in the manufacture of ammunition employed in modern warfare. During the World War there was a shortage of that substance. the plaintiff, doing business in California, as agent of the defendant, entered into two written contracts with one Murray Innes for the purchase of a large quantity of quicksilver; and in its own name the plaintiff became bound for the performance of said contracts. By two written agreements, purporting to be of even date respectively with said contracts between the plaintiff and Innes, the plaintiff assigned said contracts to the defendant, which assumed all the obligations therein imposed upon the plaintiff. Murray Innes however did not assent to these assignments and in no way released the plaintiff from its obligations under the contracts with him. When, in accordance with his undertaking. Innes delivered said quicksilver to the plaintiff the defendant refused to accept or pay for it or any part of it. The plaintiff was then obliged to pay for the quicksilver in accordance with the terms of its contracts with Innes and then sold the same at public auction, upon a falling market, at a loss. That loss with interest the plaintiff in this suit is seeking to recover as damages for the defendant's breach of its agreements to assume the plaintiff's obligations under its contracts with Innes.

At the conclusion of the evidence the defendant moved that the justice direct a verdict in its favor for the reason that in the state of the evidence upon the issues raised by three of its defences it was entitled to a verdict as a matter of law. The first of these defences was that the agreements in suit were not binding upon the defendant because it had failed to furnish to the plaintiff a written guaranty of its performance of its agreements. The second was that the

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plaintiff had not acted in good faith toward the defendant in its dealings with said Innes leading up to said contracts and the agreements in suit. The third was that the agreements were invalid because in furtherance of a conspiracy between the plaintiff and defendant. The justice denied defendant's motion for the direction of a verdict and the defendant excepted to such action of the justice. (1) exception should be overruled. There is no merit in the defendant's claim that it was not bound by said agreements because it did not procure guarantors in writing of the defendant's due performance of its obligations under the agreements. Upon the face of these agreements the obligations of the parties are in no degree conditioned upon the furnishing of such guarantors. Such guarantors if furnished would be solely for the benefit and security of the plaintiff and if the plaintiff waived such a condition in its favor, accepted the agreements without guarantors and acted in reliance upon the defendant's sole undertaking the defendant can not now be permitted to escape liability because of such waivers on the part of the plaintiff. The contention of the defendant is that the plaintiff should not be permitted to recover in this action because of its lack of good faith towards the defendant in the transactions which it carried on as the defendant's agent. Particularly it is claimed that in making the contracts in its own name for the purchase of the quicksilver in question it received from Innes a concession or rebate from the price named in the contracts. former opinion we held that in the record of the previous trial the claim of bad faith was unsupported, because by the uncontradicted evidence full disclosure regarding such rebates was made by the plaintiff's agent to the defendant's agent and acquiesced in by him before said contracts and the assignments of them to the defendant were made. At the last trial the testimony of the plaintiff in regard to such disclosure was contradicted by the testimony of Joseph H. Hoadley. It thus became a question properly to be submitted to the jury as to whether such disclosure was

made to the defendant before it entered into the agreements in suit. The main issue before the jury was as to whether the agreements sued upon were made pursuant to a conspiracy on the part of the plaintiff and the defendant to obtain a monopoly of quicksilver for the purpose of selling it at an artificially advanced and unreasonably high price in violation of the common law, the statutes of California, in which state the contracts were to be performed, and the act of Congress known as the Sherman Act. If such conspiracy existed the agreements upon which the plaintiff now seeks to hold the defendant in this suit clearly were made in furtherance of it and are not enforceable. The facts' and circumstances in evidence relating to the dealings between the parties bearing upon the issue of conspiracy were properly submitted to the jury. Upon that evidence a finding would be warranted that the plaintiff was ignorant of any illegal purpose on the part of the defendant or its agent and that the plaintiff in good faith acted as agent for the defendant who, it believed, had a legitimate purpose in desiring to purchase the quicksilver in question.

After a verdict in favor of the plaintiff upon these issues we will not overrule the decision of said justice refusing to set such verdict aside.

The defendant offered the testimony of certain witnesses as to statements which they had heard the defendant's agent, Joseph H. Hoadley, make in the course of what the defendant claims were telephonic conversations between said Hoadley in New York and John W. McNear in San Francisco. The justice allowed such testimony to be introduced in each instance where there appeared to him to be sufficient evidence of the identity of John W. McNear as the other party to the conversation, and excluded the testimony in 2) the absence of such evidence. The defendant excepted to the court's rulings excluding the testimony. These exceptions are not well taken. The distinction made by said justice regarding the admissibility of evidence as to statements purporting to be made in conversations through the

medium of the telephone was without error, and his ruling as to the insufficiency of the evidence to establish the identity of John W. McNear as the other party to such alleged conversation was justified in each instance.

In the deposition of the witness Young the justice permitted the introduction of testimony as to certain statements which the witness heard Joseph H. Hoadley make in a

telephonic conversation with John W. McNear and excluded testimony as to other statements which the witness said "impressed me in the conversation." Said justice excluded the latter testimony on the ground that the witness was testifying as to impressions rather than to his memory, and the defendant excepted. From an examination of the context it appears that the witness was endeavoring to indicate that the statements of Hoadley which the justice excluded were particularly impressed upon his memory. However the ruling of said justice in this matter, if erroneous, should not be regarded as constituting reversible error because said justice permitted such excluded statements, appearing in a subsequent portion of the deposition to be presented to the jury.

A large number of the defendant's exceptions are to rulings of said justice excluding the testimony of various witnesses as to acts done and declarations made by Joseph H. Hoadley in New York in regard to the sale of quicksilver in 1916, as to his purpose to secure a monopoly in quicksilver at that time, and as to his expectation of great profit from such monopoly. None of this proffered testimony related to matters in which any agent of the plaintiff participated or at which he was present. The contention of the defendant is that as it had presented sufficient evidence to require the submission to the jury of the issue of conspiracy between the parties, it must be held that the defendant had presented prima facie evidence of such illegal combination, and thereafter every act and declaration of each conspirator in pursuance of the concerted plan should be regarded in (4) law as the act and declaration of both and as furnishing

original evidence against each of them. (Dodge v. Goodell, 16 R. I. 48). That generally recognized principle of law is without application here. This case is distinguished from one in which a third party seeks to fix upon two or more alleged conspirators liability for an illegal combination. It is then incumbent upon such third party to establish both the combination and its illegal purpose, and having first shown a concert of design and action between the alleged conspirators he may then show, as against them all, the illegal purpose of such combination by showing the acts and the statements of each in furtherance of the combination, and may hold each responsible for the acts of the. In the case at bar there is no question but that the plaintiff acting through its agent, John W. McNear, undertook to secure for the defendant, acting through its agent Joseph H. Hoadley, a large part of the quicksilver production in the state of California for the year 1916. There can be no question that the purpose of Joseph H. Hoadley, acting for the defendant, was to obtain a monopoly of quicksilver for the purpose of reselling at an artificially advanced and unreasonably high price. The main issue and practically the sole controversy between the parties in the case is as to whether the plaintiff acting through its agent knew of the ulterior purpose of the defendant and illegally combined with it to carry out such purpose, or whether the plaintiff, as it claims, was in this matter merely pursuing its ordinary business as a commission broker and was endeavoring to secure quicksilver for its principal, the defendant, entirely without participation in the design of the defendant and without knowledge that it desired to secure said quicksilver for other than a legitimate purpose. The evidence which the defendant sought to introduce with regard to the acts and statements of Hoadley in New York was in corroboration of the admitted designs of Hoadley and the defendant, but in no way tended to support the defendant's contention of an illegal combination with the plaintiff in California to further such designs and to share in their

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anticipated profits. Such testimony was irrelevant and The occasional reference to John W. McNear inadmissible. and the plaintiff contained in the declarations of Hoadley. which the defendant sought to introduce, with one exception are entirely consistent with the plaintiff's contention that it was acting as the agent of the defendant without knowledge of the defendant's purpose. The sole reference to a combination contained in the defendant's offers of proof of the declaration of Hoadley is in its offer of proof through the deposition of the witness Young that Hoadley in the course of a conversation with Young said with reference to · McNear that "they would divide fifty fifty." This declaration of Hoadley would be inadmissible under the rule of evidence which the defendant invokes for it could not be considered as made in furtherance of the common design of the plaintiff and defendant, if one had been established, nor as part of the res gestae of any act done in furtherance of In the circumstances of the case, as presented such design. by the evidence in the transcript, a finding that the plaintiff combined with the defendant in its design to create a monopoly in quicksilver, if warranted at all, must be based upon the evidence as to the transactions and communications between the parties acting through their agents and upon the reasonable inferences to be drawn therefrom, and in no degree would a finding of conspiracy be supported by any amount of evidence as to the acts and declaration of the defendant's agent in New York of which the plaintiff was ignorant. Furthermore, we are of the opinion that in any view as to the bearing of the acts and declarations of Hoadlev upon the main issue the determination as to the admissibility of evidence as to such acts and declarations rested in

(5) the discretion of the justice. If there was evidence in the case from which a jury might possibly draw the inference that a conspiracy existed between the parties the justice under our practice would be obliged to submit the question to the jury, even though such inference would not be drawn by him, and although he might feel that a verdict finding a

conspiracy would be against the preponderance of the evidence and should be set aside by him. We are of the opinion that in the state of the proof said justice might properly exercise his discretion and exclude this testimony although under our practice he felt constrained to submit the question of conspiracy to the determination of the jury. The defendant's exceptions taken to rulings of the court

excluding certain questions propounded to the plaintiff's witness McNear in cross examination are not sustained.

(6) These questions do not have a direct bearing upon any issue in the case. Their purpose is to test or to discredit the sincerity of the witness. Some appear to have been asked in irony. In excluding these questions the justice did not abuse his discretion to regulate and restrain cross

examination of this character.

The defendant excepted to the rulings of said justice admitting evidence as to the amounts received by the plaintiff at sales of quicksilver delivered to it by Innes under said contracts subsequent to the defendant's breach of its agreements with the plaintiff. This evidence was admitted for the purpose of measuring the plaintiff's damages. The evidence in the case warranted a finding that the plaintiff entered into the two contracts with Innes merely as agent of the defendant and for the defendant's benefit. By the first of these contracts the plaintiff obligated itself to receive from Innes and to pay him for forty flasks of quicksilver per month for six months from February (7) 1916. By the second contract the plaintiff obligated itself to purchase a stipulated portion of the full product of the "Oceanic Quicksilver Mine" for six months from February 9, 1916, which portion of the production of said mine was estimated as from seventy-five to eighty flasks per month. The plaintiff assigned these contracts to the defendant but there was no novation, and the plaintiff continued bound upon its contracts with Innes. By its default and by its statements to the plaintiff the defendant clearly repudiated its obligations under said agreements of assign-

ment. By the weight of authority in this country and in England the plaintiff was then entitled, if it saw fit, to treat such renunciation on the defendant's part as a breach of the entire agreements, and to commence this action on June 6. 1916, before the termination of the period within which the full deliveries of quicksilver were to be made. If the jury found that the defendant was liable, in measuring the amount of the plaintiff's damages the jury should consider not only the plaintiff's loss upon the quicksilver which it was obliged to receive before the defendant's breach of said contracts and before the commencement of this suit, but also the plaintiff's loss in respect to quicksilver delivered under said contracts subsequent to the date of the writ. The plaintiff was not a dealer in quicksilver in the ordinary sense, and the defendant was not a purchaser from the Quicksilver was a commodity which had no plaintiff. value to the plaintiff for its own use. To reduce the amount of its loss and to mitigate the damages to be assessed against the defendant the plaintiff, with due diligence and after proper notice, sold the quicksilver from time to time at public auction. The defendant's exceptions to the admission of evidence as to the amounts received at such sales, to assist in fixing the plaintiff's damages, are without merit. Such evidence is in effect in mitigation of damages. In the leading case of Hochster v. De la Tour, 2 El. & Bl. 678, Lord Campbell said in regard to the measure of damages in a suit brought before the time fixed for the termination of an executory contract on account of an anticipatory breach of such contract, "the jury in assessing the damages would be justified in looking to all that had happened or was likely to happen to increase or mitigate the loss of the plaintiff down to the day of trial." In Frost v. Knight, L. R. 7 Ex. 111, the court said with reference to damages for the anticipatory breach of a contract to be performed at a future time, that the plaintiff "will be entitled to such damages as would have arisen from the nonperformance of the contract at the appointed time subject however to abatement in respect of any circumstances which may have afforded him the means of mitigating his loss." Rochm v. Horst, 178 U.S. 1, was an action to recover damages for the breach of four executory contracts. At the date of the action the time to commence performance of the first contract had arrived and performance by the plaintiff had been tendered and refused. As to the other three contracts, the time for performance had not arrived. The court held that the action might be maintained for the breach of the four contracts, and with reference to damages said: "As to the question of damages, if the action is not premature, the rule is applicable that plaintiff is entitled to compensation based, as far as possible, on the ascertainment of what he would have suffered by the continued breach of the other party down to the time of complete performance, less any abatement by reason of circumstances of which he ought reasonably to have availed himself."

The defendant claimed that, after it had executed the agreements to assume the plaintiff's obligations upon the (8) contracts with Innes, it intrusted such executed agreements to its agent Hoadley with explicit direction not to deliver them to the plaintiff until after Hoadley had secured options for the purchase of the rest of the California quicksilver production of 1916, which the defendant desired to obtain, and that in disregard of this instruction Hoadlev delivered the agreements to the plaintiff before said condition was fulfilled. The justice instructed the jury that this defence was not tenable and that they need give that matter no consideration. The defendant excepted. In this instructtion we do not find reversible error. What the defendant cites to us from the evidence as proof that this alleged direction of the defendant to Hoadley came to the plaintiff's knowledge before and at the time of the delivery of these executed agreements amounts to no more than a scintilla as opposed to the plaintiff's denial and the overwhelming preponderance furnished by the correspondence and the circumstances in the case. At the defendant's solicitation

and for its benefit the plaintiff had unconditionally placed itself under heavy liability to Innes, with the understanding that the defendant should assume such liability. defendant's agent delivered to the plaintiff with the executed agreements a certified copy of a resolution of the defendant's This resolution was as follows: "Reboard of directors. solved that the Chairman of the Board is hereby authorized and empowered to sign contracts with George W. McNear Incorporated, dated January 28th and February 9th 1916 and furnish said company with a certified copy of this resolution." The circumstances surrounding the transaction would justify the plaintiff in acting in reliance upon the terms of the agreements formally executed by the responsible officers of the defendant corporation, sealed with its corporate seal and delivered by its apparently fully authorized agent. In the face of these circumstances we should not be warranted in setting the verdict aside solely because this question which the defendant raised was not submitted to the jury.

The defendant excepted to the refusal of said justice to submit certain questions to the jury for special findings. These questions are as follows: "1. Was Mr. Hoadley endeavoring in January and February 1916 to get control of a sufficient quantity of quicksilver to enable him to raise the price of quicksilver? 2. Was John A. McNear working with Joseph H. Hoadley to enable Mr. Hoadley or the defendant to get control of a sufficient amount of quicksilver to raise the price of quicksilver? 3. Was Mr. Hoadley endeavoring in January and February 1916 to get control of a sufficient quantity of quicksilver to enable him to artificially raise the price of quicksilver? 4. Was John A. McNear working with Joseph H. Hoadley to enable Mr. Hoadley or the defendant to get control of a sufficient quantity of quicksilver to enable him to artificially raise the price of quicksilver?" The defendant bases its right to have these questions submitted upon the following provision of Section 6, Chapter 291, General Laws 1909: "In

(9) any case the court may and upon request of either party shall direct the jury to return a special verdict upon any issue submitted to the jury." This statutory provision relates to the submission for special finding of a question involving some material issue in a case and not to the submission of what is merely a controverted point in evidence. One of the material issues in this case, and as the case was tried almost the sole issue, was whether the plaintiff and defendant in the transaction, of which the agreements in suit were a part, had combined to obtain a monopoly of quicksilver with the unlawful intent of selling the same at an unreasonably high price. A request for a special finding upon a question which should embody that issue would be within the terms of the statute. In refusing to submit the question presented by the defendant said justice intimated his willingness to submit a question which should call for a finding upon the material issue which we have stated. It is true, as the defendant points out, that said justice in his charge instructed the jury that the "plaintiff is bound by the acts, purposes, intent and knowledge of John A. McNear who was acting for it, and the defendant is bound by the acts, purposes, intent and knowledge of (10) Joseph H. Hoadley who was acting for it." This instruction is a reasonable interpretation of the evidence. It was not excepted to by either party and must be taken as the law of the case. The defendant claims that in the light of that instruction the questions presented by it for submission to the jury do as a whole fairly present the material issue to which we have referred. The justice properly required that the questions submitted should plainly call for a finding as to whether the plaintiff and defendant acting through their respective agents were working together in furtherance of a common unlawful design. That was all for which the defendant could properly ask under the statute. If however there should be conceded to the defendant the interpretation which it now places upon the language of these questions, the defendant has not been prejudiced by

the refusal of the justice to submit them for special findings, for the issue which we have stated was the particular matter in controversy between the parties in the long trial before the jury. It formed the subject of a large part of the arguments of counsel. It was clearly and at length explained and submitted to the jury by said justice in his charge and they were instructed by him that the matter of the conspiracy "is the principal defence and to that you will devote your careful consideration." The questions offered for submission must have been intentionally answered adversely to the defendant in the general verdict.

The defendant insists upon its exception to the action of said justice in charging the jury in accordance with the plaintiff's ninth, tenth, eleventh and twelfth requests to charge. These requests are as follows: "9. If the defendant relies upon a conspiracy it must show such conspiracy to have been between the McNear Company and the American and British Company. It is not sufficient to show that Hoadley alone may have been engaged in such enterprise to obtain or raise the price of quicksilver. 10. There is no evidence in the case that the defendant corporation authorized Hoadley to sell or dispose in any way of the quicksilver obtained under the contracts in suit. evidence is uncontradicted that Hoadley was not an officer, agent or employee of the defendant corporation and unless he was given authority by some action of the defendant his conduct in disposing of quicksilver would not be the conduct of the defendant. 12. Hoadley was not an officer or employee or agent of the American and British Company and that company cannot plead any unlawful acts of his as a defence to the action unless it proved that what he did or attempted to do in dealing with quicksilver purchased by the contracts of January 28th and February 9th was done by its authority (or that such acts were subsequently These instructions in so far as they purport to set forth legal principles are correct statements of law. their application to the facts of this case they should be

considered in connection with the explicit instructions of said justice contained in his general charge, i. e., that a conspiracy may be proved by inferential and circumstantial evidence although there is an absence of positive evidence and that in the determination of the issue of conspiracy the jury should take into consideration the communications between the parties and all proper and legitimate inferences to be drawn from them, and also his instruction that in this transaction the plaintiff is bound by the acts, purposes, intent and knowledge of John A. McNear and the defendant by the acts, purposes and intent of Joseph H. Hoadley. In so far as these requests to charge state conclusions of fact from the evidence they are warranted. There was no evidence in the case of a special authorization from the defendant to Hoadley to sell any of the quicksilver obtained under the contracts in suit. It was uncontradicted that Hoadley was not an officer of the defendant and there is no positive evidence that he was an agent or employee of the defendant for the purpose of disposing of quicksilver although an inference of such agency or employment would not be unwarranted from the evidence and it is plain that Hoadley was the defendant's agent in arranging for the purchase of quicksilver in California. All acts looking toward the disposition of quicksilver by Hoadley or by the defendant took place in New York and in these neither the plaintiff or its agent took part nor is there any evidence that the plaintiff or its agent had knowledge of such acts, save as such knowledge might be inferred from the correspondence between the parties, which correspondence was placed before the jury. In line with what we have already said in this opinion, the conduct of Hoadley with reference to the disposition of quicksilver in New York is not material to the issue before the jury, whether such quicksilver was his own or was that which the defendant was to obtain under said contracts with Innes, and whether Hoadley's conduct in that regard was or was not authorized by the defendant. Such conduct tends to support the defendant's

claim as to its own and Hoadley's design in attempting to acquire a control of quicksilver, regarding which claims there is no dispute in the evidence, but it does not tend to support the defendant's claim of an illegal combination with the plaintiff in California in furtherance of such design.

There is no merit in the defendant's so-called exception to what it claims was the misconduct of plaintiff's counsel in his argument to the jury. We have frequently had occasion to say that the office of a bill of exceptions under the statute is solely to bring before us for review rulings of the Superior Court to which exceptions have been duly Such bill of exceptions may not include other matters, as in this instance objections to the conduct of counsel. If in any case a party considers that he has suffered prejudice through the conduct of a juryman, a witness or an opposing counsel or in respect to any other matter, arising in the travel of the cause, other than the action of the court itself, such party should first ask the court for some appropriate action on its part to relieve him from the effect of such harmful matter. If the court fails to grant him the relief to which he considers himself entitled then by exception duly taken to the court's action he may bring the court's ruling before us for review.

All the defendant's exceptions are overruled. The case is remitted to the Superior Court for the entry of judgment on the verdict.

Charles F. Choate, Jr., Archibald MacLush, Frank T. Easton, Greenough, Easton & Cross, for plaintiff.

Waterman & Greenlaw, for defendant.

JOHN A. FRITZ, et al. vs. WALTER A. PRESBREY, et al.

PATRICK LOUIS MONAHAN, et al. vs. WALTER A. PRESBREY, et al.

MARCH 14, 1922.

PRESENT: Sweetland, C. J., Vincent, Stearns, Rathbun, and Sweeney, JJ.

- (1) Police Power. Traffic Regulations. Delegated Authority.
- Pub. Laws, cap. 1263, (1915) provides that any city or town council may by ordinance make such general rules and regulations governing the use and operation of motor buses in the streets and public places as it may deem necessary or desirable for the public safety, welfare and convenience and "especially to prevent congestion of traffic may itself or by such officer, board or commission as it may authorize prescribe and limit the route or routes to be traveled by such motor buses" and further any city or town council may prescribe that no motor bus shall be operated within such city or town without a special annual license therefor.
- Sec. 6 of the Motor Bus Ordinance of the City of Providence as amended by cap. 276, of the ordinances of said city approved Dec. 20, 1920, provides that "every motor bus license shall be subject to the condition that if at any time legal provision is made prescribing, limiting, altering or abolishing any route or routes to be traveled by motor buses, such license and the bus licensed shall be subject thereto and operated accordingly."
- The city council of Providence passed an ordinance prescribing that motor buses should not be operated within a specified area in the center of the retail business section of the city.
- On bill seeking to enjoin the enforcement of the provisions of the ordinance on the ground that it was a gross abuse of the regulatory power of the city council and was unreasonable, unjust and discriminatory and its provisions were unrelated to public safety or convenience, a temporary injunction was granted and on appeal of respondents.
- Held, that cap. 1263, was a delegation of police power to the city and town councils, in respect to its subject matter and while such power was expressly granted it was in general terms, the mode of its exercise being left to the discretion of the council and as to ordinances passed under such a grant of power the court will consider their reasonableness and pass directly upon their validity.
- (2) Police Rower. Delegated Authority. Construction.
- In passing upon the reasonableness of an ordinance, passed under the delegated police power of the state, where the mode of the exercise of the power is left to the discretion of a municipal council, the court will apply to its provisions the tests which are applicable in determining the validity and constitutionality of a statute having a like purpose.



(3) Police Power. Delegated Authority. Construction.

Courts will scrutinize legislation purporting to be enacted for the public welfare to see if the object sought calls for the exercise of the police power. If such object can fairly be said to be a regulation to promote the safety. health, morals, comfort or convenience of the community then the court will not interfere with the wide scope of legislative discretion in determining the policy to be employed in its exercise, unless it appears that the discretion has been abused and the legislative action is so clearly unreasonable and arbitrary as to be oppressive.

(4) Constitutional Law. Presumptions. Statutes.

All statutes are presumed to be valid and constitutional and the burden of proving the unconstitutionality of any statute is upon the party raising the question; and the proof must be beyond a reasonable doubt.

(5) Police Power. Traffic Regulations. Injunctions.

Before the court should act to enjoin the enforcement of the exercise of the police power to regulate traffic in the crowded streets of a city, it must appear that the ordinance was an arbitrary exercise of power or that its provisions have no reasonable relation to the promotion of the safety and convenience of the public as a whole in its use of the highways within the prescribed area, and the fact that the termini fixed by ordinance proved less convenient for some patrons of the motor buses and that the restriction of traffic resulted in pecuniary loss to certain licensees of motor buses does not render such ordinance invalid, unless it is further shown that it was adopted in arbitrary and oppressive disregard of their rights.

(6) Police Power. Injunctions. Traffic Regulations.

Where there was nothing before the court that would warrant a finding that an ordinance passed under the delegated police power of the state was invalid, it was error to stay its operation on the ground of the balance of convenience between the parties, for such principle has no application in favor of a complainant who is himself without legal right and is seeking to restrain a lawful act.

(7) Preliminary Injunctions.

While the issuance of a preliminary injunction rests in the sound discretion of the court, it will not be supported when it is clear that the court's discretion has been exercised in an illegal manner or in favor of a complainant who has not made out a *prima facie* case for relief.

Sweeney, J., dissenting.

BILLS IN EQUITY seeking relief. Heard on appeal from decree of Superior Court and decree reversed, and injunctions granted vacated.

SWEETLAND, C. J. The above entitled proceedings are bills in equity filed by certain complainants who allege that

in the city of Providence they have been duly licensed to engage in the business of transporting passengers for hire by means of motor vehicles, termed "motor buses" under the provisions of Chapter 1263, Public Laws 1915, and popularly called "jitneys."

The complainants seek to restrain the Board of Police Commissioners and the Superintendent of Police of Providence from enforcing against the complainants the provisions of a certain ordinance of said city regulating the operation of motor buses, and prescribing and limiting the route or routes to be traveled by such motor buses within said city.

The causes were tried before a justice of the Superior Court upon the prayer of each complainant for a temporary injunction. By his decrees said justice granted these prayers and temporarily restrained the respondent Board and Superintendent from enforcing said ordinance. The causes are now before us upon the respondent's appeals from said decrees.

The ordinance in question prescribes that motor buses shall not be operated within a specified area in the center of the retail business section of Providence. In accordance with the direction contained in said ordinance the Board of Police Commissioners have fixed locations for the termini of motor buses just without said prescribed area. The objections of the complainants are that said ordinance and the action of the Board of Police Commissioners pursuant thereto are gross abuses of the regulatory power of the city council; that said ordinance is unreasonable, unjust and discriminatory; that its provisions are unrelated to public safety or convenience, and that the complainants, because they are prevented from transporting their passengers through said area and to its center, have been affected in their business and have suffered and are likely to suffer pecuniary loss.

Said ordinance was adopted in reliance upon authority, given by Chapter 1263, Public Laws 1915. Said statute among other things, provides that any city or town council

may by ordinance make such general rules and regulations governing the use and operation of motor buses in the streets and public places of such city or town as it may deem necessary or desirable for the public safety, welfare and convenience and "especially to prevent congestion of traffic, may itself, or by such officer, board or commission as it may authorize, prescribe and limit the route or routes to be traveled by such motor buses, respectively" and further any city or town council may prescribe that no motor bus shall be operated within such city or town without a special annual license therefor. Section 6, of the Motor Bus Ordinance of the city of Providence, as amended by Chapter 276 of the ordinances of said city approved December 20, 1920, provides for such special annual license and further provides that "Every motor bus license shall be subject to the condition that if at any time legal provision is made, prescribing, limiting, altering or abolishing any route or routes to be traveled by motor buses, such license and the bus licensed shall be subject thereto and operated accordingly."

It is manifest that by Chapter 1263 of the Public Laws the General Assembly intended to delegate to the city council of Providence, in common with the other city and town councils of the state, a part of its police power. Within the territorial limits of Providence, for the public safety and convenience, the city council was authorized to regulate the business of operating motor buses, and in order to prevent congestion of traffic it might prescribe and limit the routes which motor buses should travel. These considerations of public welfare undoubtedly present a field for the exercise of the police power.

At the outset in the consideration of this matter we are met by the contention of the respondents that the Superior Court and this court is without jurisdiction to inquire into or pass upon the question of whether this ordinance is unreasonable, oppressive and not conducive to public safety and convenience, because the ordinance was not adopted by

virtue of any implied power of the city council but upon an express grant of power from the General Assembly. can not agree with this contention of the respondents. opinions of the courts in other jurisdictions cited by the respondents as authorities for their position do not, when analyzed, support but are opposed to the respondents' claim. The correct rule is that set out in the very able and comprehensive brief and argument of counsel for the complainants. If an ordinance is passed in virtue of and in (1) exact conformity with an express grant of legislative power in which the manner of its exercise is prescribed in definite and precise terms, a court will not pass upon the validity of such an ordinance. The attack, if any, must be made against the constitutionality of the enabling statute. Such a case would have been presented if the General Assembly had in express terms empowered the city council to exclude the operation of motor buses upon the area defined in the ordinance now under consideration. The power given to the city council by Chapter 1263 of the Public Laws to prescribe and limit the routes of motor buses is expressly granted but in general terms and the mode of its exercise (2) is left to the discretion of the city council As to ordinances passed under such a grant of power or as to those adopted in reliance upon general implied powers, the courts will consider their reasonableness and pass directly upon their validity. State v. Mayo, 106 Me. 62; In re Anderson, 69 Neb. 686; City of Emporia v. Railway Co. 94 Kan. 718; Phillips v. City of Denver, 19 Colo. 179; Haynes v. Cape May, 50 N. J. L. 55; Chicago v. Ripley, 249 Ill. 466; City of Lakeview v. Tate, 130 Ill. 247; Shelbyville v. Cleveland etc., Ry. Co. 146 Ind. 66.

In considering the reasonableness of the ordinance in question, passed under the delegated police power of the state, the court will apply to its provisions the tests which are applicable in determining the validity and constitution(3) ality of a statute having a like purpose. When called upon courts will scrutinize legislation purporting to be enacted

for the public welfare to see if the object sought calls for the

exercise of the police power. If such object can fairly be said to be a regulation to promote the safety, health, morals, comfort or convenience of the community, then courts will not interfere with the wide scope of legislative discretion in determining the policy to be employed in its exercise, unless it appears that the discretion has been abused and the legislative action is so clearly unreasonable and arbitrary as to be oppressive. In East Shore Land Co v. Peckham, 33 R. I. 541, at 548, this court said, "All statutes are presumed to be valid and constitutional and the burden of proving the unconstitutionality of any statute is upon the party raising (4) the question; furthermore, the rule is that he must prove it beyond a reasonable doubt." In State v. Narragansett, 16 R. I. 424, at 440, the court said, "The rule generally laid down is, that statutes should be sustained unless their unconstitutionality is clear beyond a reasonable doubt. reasonable doubt is to be resolved in favor of the legislative action and the act sustained." Also see Cleveland v. Tripp 13 R. I. 50. In the Opinion to the Governor, 24 R. I. 603, it was said. "Both this court in State v. Peckham, 3 R. I. 289, and the Supreme Court of the United States in Munn r. People, 94 U.S. 113, have declared that the legislature is the exclusive judge of the propriety and necessity of legislative interference within the scope of legislative power. If a state of facts could exist which would justify legislation, it is to be presumed that it did exist " The complainants' criticism of the language of the court in some of these cases indicates a misconception of the nature of an inquiry as to the constitutionality of an act of the General Assembly. The ordinary rules as to proof have no application in such proceeding. The inquiry is a consideration by this court in regard to the constitutional propriety of the act of a coordinate branch of the government. Before this court will declare the unconstitutionality of such act, in either a civil or criminal proceeding, the court must be convinced of the in-

validity beyond a reasonable doubt. In delivering the opinion of the court in Wellington et al, Petitioner, 16 Pick. 87, at 95, CHIEF JUSTICE SHAW said: "when called upon to pronounce the invalidity of an act of legislation passed with all the forms and solemnities requisite to give it the force of law, courts will approach the question with great caution. examine it in every possible aspect, and ponder upon it as long as deliberation and patient attention can throw any new light on the subject, and never declare a statute void. unless the nullity and invalidity of the act are placed, in their judgment, beyond reasonable doubt." In Horton v. Old Colony Bill Posting Co., 36 R. I. 507, the court in declaring the validity of the so-called Billboard Ordinance, adopted by the Providence City Council, held that "In view of the fact that the lawmaking body has far more opportunity to ascertain and meet the public need than the court can have, and in view of the wide latitude permitted the legislative branch in determining the public needs and the appropriate remedies, the court should uphold the limitations on size imposed by this section, which in our opinion are not clearly unreasonable."

The regulation of vehicular traffic in the crowded streets of the city of Providence for the purpose of promoting the safety and convenience of the people using those streets presents a proper subject for the exercise of the police power. Whether the policy of the city council, embodied in the ordinance, presents the best scheme of regulation is not a judicial question. The complainants should not be granted an injunction, permanent or temporary, until they have established unmistakably that the ordinance in question is an arbitrary exercise of power or that its provisions have no reasonable relation to the promotion of the safety and convenience of the public, as a whole, in its use of the highways within said prescribed area. This the complainants have failed to do. They do not question that the traffic congestion in the streets and public places included in said area is the greatest in the city; that the city council

has endeavored to relieve this congestion by restricting the length of time that vehicles may stand in said streets and public places, by entirely prohibiting such standing in some locations, by stationing traffic policemen in various places in such area to direct the movement of traffic, and by providing that in some of said streets traffic shall proceed in one direction only. The complainants have not attempted to deny that the removal of the business of operating motor buses from this area will tend to promote the safe and convenient use of the highways therein by the community generally. At the hearing before said justice the complainants presented the testimony of two witnesses, who said they sometimes patronized motor buses operating on Broadway, and that they found the terminus of that line without said area less convenient for them than the former terminus within said area. Undoubtedly many witnesses might be produced who would give similar testimony. city council sought to relieve to some degree the congestion in the most congested district of the city, and for the public safety, welfare and convenience removed the business of operating motor buses from that district. The testimony of patrons of such buses that, as to them, the new termini were less convenient than the old does not tend to establish that the removal of said buses from the district did not relieve such congestion and that the safety, welfare and convenience of the large number of persons using the streets of said district at all hours of the day were not promoted thereby, or that the policy adopted by the city council has no reasonable relation to the legitimate objects sought. The only other matter presented to said justice was the testimony of several holders of motor bus licenses to the effect that since the change in termini there has been a decrease in the number of their passengers and a consequent falling off in their receipts from fares. This, however, in the circumstances furnishes no ground for relief. As we have seen above the ordinance was an exercise of delegated police power directed toward an object well within the scope

of that power and having a reasonable relation thereto. Although it may have resulted in pecuniary loss to the licensees that does not render the ordinance invalid unless it is plainly shown that it was adopted in arbitrary and oppressive disregard of their rights. There was nothing produced at the hearing which would warrant such a finding. These licensees are subject to the ordinary rule, that the individual is without relief if he finds his business injuriously affected by a proper exercise of police power. In this case though such licensees may regret the result thay have no ground for complaint for they accepted licenses which contained the express provision that they were subject at any time to a legal provision prescribing, limiting, altering or abolishing any route or routes to be travelled by motor buses.

- There was nothing before the Superior Court that would warrant a finding that the ordinance in question was invalid. Everything points to its validity. The ordinance being valid it was error to stay its operation by temporary injunction. It appears from the decision of said justice upon which the decrees were based that he felt constrained to grant the injunction upon what he regarded as the balance of convenience between the parties. The principle of the balance of convenience is without application in favor of a complainant who is himself without legal right and is seeking to restrain a lawful act. This court has approved the rule that the issuance of a preliminary injunction rests in the sound discretion of the court; but an injunction will not be [7] supported when it is clear that the Court's discretion has
 - 7) supported when it is clear that the Court's discretion has been exercised in an illegal manner or in favor of a complainant who has not made out a prima facie case for relief. Rhodes Bros. Co. v. Musicians Union, 37 R. I. 281, 290; Armour v. Hall, 38 R. I. 300; Blackstone Hall Co. v. R. I. Hospital Trust Co. 39 R. I. 69.

The decrees appealed from are reversed. The injunctions granted are vacated and the causes are remanded to the Superior Court for further proceedings.

SWEENEY, J., dissenting. I agree with the opinion of the Court, in which they hold that the Superior Court has jurisdiction to hear and determine the question of the reasonableness of the ordinance; but respectfully dissent from their conclusion reversing the decrees granting the preliminary injunctions, and my reasons for dissenting are as follows:

As has been stated, these appeals are before this court upon the respondents' appeals from decrees of the Superior Court granting preliminary injunctions, restraining the respondents from enforcing an ordinance passed by the city council of Providence.

It appears from the bills of complaint that the complainants operate motor buses in said city, and they allege that the ordinance is unreasonable, unjust and discriminatory; that it is a gross abuse of regulatory power, and that its enforcement will result in the destruction and prohibition of their business, and cause them irreparable loss, injury and damage.

The respondents do not attack the insufficiency of the allegations of fact in the bills of complaint, nor their want of equity, by demurrer, as they should do, if such were apparent upon an inspection of the bills of complaint. Allen v. Woonsocket Co., 11 R. I. 288. On the contrary, they impliedly admit the sufficiency of the bills by filing answers, admitting some of the facts alleged in the bills, and denying others, and the cases are ready for the framing of issues of fact, and the trial thereof.

At the hearing in the Superior Court on the question of fact,—the unreasonableness of the ordinance,—upon the testimony adduced, the Court was of the opinion that the evidence required the granting of preliminary injunctions to protect the rights of the complainants from irreparable injury and damage. The respondents, deeming themselves aggrieved by the granting of said injunctions, claimed appeals therefrom to this court, as authorized by Sec. 34, Chapter 289, General Laws 1909. This section, permitting

an appeal from the granting of an injunction in the Superior Court, provides, among other things, that "The appeal shall transfer to the Supreme Court only the question whether the decree appealed from shall be affirmed, reversed or altered." Said section also requires the appellants to "file a claim of appeal, with a statement of the reasons therefor."

The respondents state, as the only reasons for their appeals (1) that the decrees granting the injunctions are contrary to law; and(2) that the Superior Court improperly granted injunctions by mistake and error of law. In their printed brief the respondents state the questions raised by them under their reasons of appeal as follows:

- "1. Was the question whether the ordinance was reasonable a question that could be determined by the Superior Court?
- "2. Did the Superior Court have any discretion to grant an injunction?"

The respondents argue under question 1 that "the question whether the ordinance was reasonable was not a question that could be determined by the Superior Court"; and under question 2 they argue that "the Superior Court had no discretion in the matter of granting an interlocutory injunction." In concluding their argument of these questions, on page 41 of their brief, they say, "This line of consideration, which need be pursued no further, reduces to an absurdity the suggestion, that ordinances of this character, enacted in pursuance of a statute of the character here under discussion, are subject to the test of a court's approval.

"The Superior Court, in granting these preliminary injunctions, committed error in law."

This court, after careful consideration of the argument of the appellants, has decided that the ordinance in question, being passed under general legislative authority, is subject to judicial review as to its reasonableness, and therefore the Superior Court has jurisdiction of the question.

It being held that the Superior Court has jurisdiction of the subject matter, its authority to issue a preliminary injunction, in the exercise of judicial discretion is inherent and unquestionable.

In the claims of appeal it is not stated that the decrees of the Superior Court in granting the preliminary injunctions were against the evidence, or the weight thereof; and the only questions raised by the respondents in this court in their claims of appeal, and argued in their brief, are those of law denying the jurisdiction of the Superior Court to hear and determine the question of the reasonableness of the ordinance, and the power of that court to grant an injunction.

In trying to sustain their appeals, the appellants are restricted to the reasons stated by them in their claims of appeal.

The effect of an appeal in an equity cause, and the necessity of a sufficient statement of the reasons of appeal, has been discussed by this court in a carefully prepared opinion in the cause of Vaill v. McPhail, 34 R. I. 361, wherein the court states on pages 363, 364, "If, however, the appeal removes nothing to this court except the errors appearing. upon the record and complained of by the appellant, then the statement of the reasons of appeal should be specific: should be as full as the claim of the appellant, and must be regarded as the jurisdictional basis of the cause in this court, limiting all subsequent proceedings here." The court further says, page 371, "Certain incidental and subordinate jurisdiction over the cause is given to this court pending the appeal, but the general effect of the appeal is to bring before the Supreme Court for review merely the errors stated in the appellant's reasons of appeal." And the court holds that "In conformity with our view of the nature of equity appeals in this State, we hold it essential that the appellant should clearly indicate in his reasons of appeal the particular errors of the Superior Court of which he complains and which he seeks to have reviewed. These reasons should be stated separately, and specifically. The statement of reasons of appeal which the statute requires is a statement

of the erroneous rulings, orders or decrees of which the appellant complains." Page 373. The opinion concludes the discussion of this subject by saying, "To the consideration of the alleged errors which they have thus designated they will be restricted in the proceedings before this court." Page 376.

There is a presumption in favor of the validity of the ordinance; but this presumption is a rebuttable one and may be overcome by testimony produced by the person attacking its validity. In the instant cases the complainants attacked the validity of the ordinance and introduced sufficient testimony to require the court, in the exercise of its discretion, to enter decrees granting preliminary injunctions to protect the rights of the complainants from irreparable injury and damage.

The respondents do not claim that the entry of these decrees was contrary to the evidence or to the weight thereof and, under their limited reasons of appeal, this ground cannot now be considered as a reason for reversing said decrees, and the respondents have not argued such a ground.

As the question of the sufficiency of the evidence showing the unreasonableness of the ordinance to require the issuance of the injunctions is not before this court on the reasons of appeal, I refrain from discussing it.

This court having decided that the Superior Court had jurisdiction of the question of the reasonableness of the ordinance; and as the question of its reasonableness is dependent upon the testimony introduced by the complainants and respondents; and the court having found that the testimony required the granting of the preliminary injunctions to protect the rights of the complainants from irreparable injury and damage; and there being no claim by the respondents that this finding of the court is against the evidence or the weight thereof; under the law, and the issues before this court, the decrees appealed from should be affirmed.

Albert B. West, for complainants.

Pettine & De Pasquale, John F. Murphy, William W. Blodgett, for certain complainants.

Elmer S. Chace, City Solicitor, Herbert E. Eklund, Assistant City Solicitor, for respondents.

John Garst vs. John G. Canfield et al.

MARCH 29, 1922.

PRESENT: Sweetland, C. J., Vincent, Stearns, Rathbun, and Sweeney, JJ.

- (1) Principal and Agent. Trust Funds.
- X. sold securities for Y. It was the duty of X to obtain subscriptions and a check payable to Y. for the purchase price. After forwarding 60% of the price to Y., X. received from Y. the certificates which he delivered to customers. Y. was at liberty to reject any subscription. X. was required to indorse checks for collection and permitted to retain as commission 40% of the amount received from which 40% he paid all his expenses. X. opened a bank account in the name of "X. Manager" and no other money than checks received in payment of Y's stock went into the account. X. made weekly reports to Y. showing the amount of the subscriptions and amount remitted and accompanied by check drawn against the account for 60% and a receipt from X. showing the receipt of his commission.

Held, that there was no intention to create the relation of debtor and creditor between the parties and the fund was the property of Y.

- (2) Trust Funds. Mingling Funds.
- Where a trustee mingles in a bank account his own money with trust funds and then makes withdrawals for his own use he will be presumed to have used his own money to the extent that he had money in the account. If such withdrawals exceed the amount of his own money and he afterwards deposits other money of his own it will be assumed that it was his intention to make the trust fund whole.
- (3) Foreign Corporations. Appointing Attorney.
- The long established rule in this state is not changed by Pub. Laws, cap. 1925, sec. 67, and a foreign corporation is entitled to enforce in the courts of this state a contract made by it within this state, although it had not complied with the statute by appointing a resident attorney at the time the contract was made, provided it had appointed such attorney before commencing suit.

Assumpsit. Heard on exceptions of plaintiff and overruled.

RATHBUN, J. This is an action in assumpsit commenced in the Superior Court. The original writ was served on the Mechanics National Bank for the purpose of attaching the personal estate of the defendant in the hands and possession of said bank. The return of said bank shows that at the time of the service of said writ there was on the books of said bank the sum of \$5.014.13 credited to "John G. Canfield Company, Manager." Arthur J. Mitchell & Company, Inc. made claim to the attached fund and on motion was made a party to the suit in so far as title to said fund was concerned. After decision in the original action for the plaintiff and before the entry of judgment the plaintiff made a motion to charge said bank as garnishee to the extent of the amount disclosed. After a hearing said court denied said motion and granted a motion of said Arthur J. Mitchell & Company, Inc., the intervener, to discharge the garnishee, and also decided that the fund in question was the property of the intervener. The case is before this court on the plaintiff's exceptions to the rulings of the trial court on said motions and to the decision of said court that the fund in question was the property of the intervener.

It appears from the evidence that John G. Canfield was appointed agent to represent the intervener in the sale of stocks in Rhode Island. By the terms of the employment it was the duty of Canfield to solicit subscriptions for stocks, obtain from each subscriber a check for the full amount of the price of the stock subscribed for and remit to the intervener sixty per cent of the amount received. Each subscription agreement provided that Arthur J. Mitchell & Company Inc., was at liberty to accept or reject the subscription. Canfield was required to have all checks for stock made payable to the order of Arthur J. Mitchell & Company, Inc. Canfield was required to indorse the check for collection and permitted to retain as a commission forty per cent of the amount received. From his commission Canfield paid all of his expenses incident to the business. including office rent, remuneration to subagents, purchase

of supplies, etc. It was the regular course of business for the intervener on receipt of sixty per cent of the subscription price of a stock to send the stock certificate to Canfield who delivered the same to the subscriber.

Canfield, after receiving the appointment, opened an account in said Mechanics National Bank in the name of "John G. Canfield Company, Manager." In this account he deposited checks which he received from subscribers in payment for stock. It does not appear that money from any other source than checks received in payment for the intervener's stock ever went into this account. On August 24, 1920, the plaintiff, by the original writ in the action attached by trustee process said account. It appears from the evidence that Canfield deposited in said account checks (all of which were collected) which he had received in payment for intervener's stock to the amount of \$8,530, and that the intervener was entitled to receive sixty per cent. of said amount, that is, \$5,118. It is evident that Canfield had drawn for his own use more than forty per cent, his share of the amount collected through the bank, as there was but \$5,014.13 in said account at the time of the attachment. Canfield, having drawn from said account more than forty per cent of the funds received from the sales of stock, the intervener contends that the whole of the attached fund is the property of the said Arthur J. Mitchell & Company, Inc., the intervener.

The fundamental question is whether the mere relation of debtor and creditor existed between Canfield and the intervener, or whether Canfield was acting in a fiduciary capacity in collecting checks through the bank and remitting sixty per cent of the proceeds to the intervener. What was the intention of the parties? The trial court evidently found that it was the intention of the intervener and Canfield that the latter should hold in a fiduciary capacity the proceeds of stock subscriptions. The findings of the trial court on questions of fact are entitled to great weight and we are unable to perceive how said court could

have arrived at any other conclusion. See Natl. Bank v. Ins. Co. 104 U. S. 54. The material facts bearing upon this question are undisputed. Canfield sold securities for the intervener. The securities were not sold on credit or (1) otherwise to Canfield for the purpose of resale. It was his duty to obtain subscriptions and in each instance a check payable to the intervener for the purchase price. After forwarding sixty per cent of the subscription price to the intervener Canfield received from the intervener the stock certificates which he delivered to the customers. The intervener was at liberty to accept or reject all of the subscriptions. The subscription agreement contained the following: "In case this application is not accepted for any cause, the amount paid will be returned promptly." . . .

"Make all checks payable to Arthur J. Mitchell." "Notice: If you do not receive an acknowledgment in ten days write Arthur J. Mitchell, Chicago, Ill." Canfield made weekly reports to the intervener. These reports, which are signed by Canfield, show the relation of the parties. Each report is a salesman's account with his principal. Each report shows the name of each subscriber, the amount of the subscription, the amount of the commission and the amount to be remitted. Each report was accompanied by a check drawn against said bank account for sixty per cent of the subscription price on all orders reported. Each report contained also a receipt signed by Canfield acknowledging the receipt by him of his commission. If the money belonged to Canfield and he was a debtor for a part of it to the intervener, why did Canfield receipt for his own money? Canfield in taking subscriptions for stock was required to obtain from the subscriber a check for the purchase price payable to the order of the intervener. The money represented by this check was the intervener's money. Canfield was authorized as "manager" for the intervener to indorse the check for collection. He was required to collect the check by depositing it in the bank to the credit of an account in the name of "John G. Canfield

Company, Manager." He was required to promptly report the subscription and at the same time remit by check drawn against said account for sixty per cent of the subscription price. It is clear from the testimony that Canfield and the intervener never intended to create the relation of debtor and creditor between themselves.

It is contended by the plaintiff that Canfield is the owner of at least forty per cent of the fund attached. As we have already stated, it is evident that Canfield drew for his own use from said account more than his commissions, that is (2) forty per cent of the money received for stock subscriptions. If a trustee mingles in a bank account his own money with trust funds and then makes withdrawals for his own use the law is settled that he will be presumed to have used his own money to the extent that he had money in the account. If such withdrawals exceed the amount of his own money in the account and he afterwards deposits other money of his to the same account, courts will assume that it was his intention in making such deposit to make the trust fund whole. Hungerford v. Curtis, 43 R. I. 124, 110 Atl. 650; Slater v. Oriental Mills, 18 R. I. 352, 27 Atl. 443. Natl. Bank v. Ins. Co. 104 U. S. 54. As Canfield in the bank account in question mingled his own money with trust funds which he held for the intervener and as the trust fund is incomplete because of Canfield's withdrawals for his own use of more than the amount of his money mingled in the account, it follows that the whole of the balance belongs to the intervener.

The plaintiff contends that the intervener should be denied access to the courts of this state for the reason that the intervener was during the time when the funds in question were being deposited in said account a foreign corporation doing business in this state without having appointed a resident attorney in this state upon whom process might be served, as required by Chapter 1925 of the Public Laws. Section 67 of said chapter, after imposing a penalty upon foreign corporations and its officers for

transacting business in this state without complying with certain provisions of said chapter, including the provision requiring the appointment of a resident attorney, contains language as follows: "Such failure shall not affect the validity of any contract with such corporation, but no action at law or suit in equity shall be maintained or recovery had by any such corporation on any contract made within this state in any of the courts of this state so long as it fails to comply with the requirements of said sections." But the intervener had appointed a resident attorney upon whom process might be served and had in every respect complied "with the requirements of said sections" before it sought the aid of our courts.

Said Chapter 1925 amends, and to a considerable extent supercedes, Chapter 300 of General Laws 1909. Section 42 of said Chapter 300 has been construed by this court. Said section provides that no foreign corporation (with certain exceptions not material to this case) "shall carry on within this state the business for which it was incorporated, or enforce in the courts of this state any contract made within this state, unless it shall have complied with the following sections of this chapter."

"The following sections" require among other things, the appointment of a resident attorney upon whom process may be served. In construing said section this court held in Swift v. Little, 28 R. I. 109, that a foreign corporation might enforce in the courts of this state, a contract which such corporation had entered into within this state, although said corporation had not complied with the statute by appointing a resident attorney at the time the contract was made, provided the corporation appointed a resident attorney, as required by statute, before commencing suit. The construction adopted in Swift v. Little, supra, has been for many years the accepted construction of Section 42 of said Chapter 300. See Frank v. Broadway Tire Exchange, 42 R. I. 27. Had the legislature with a presumed knowledge of said construction intended to deny to a foreign

corporation the use of our courts to enforce a contract made within this state before said corporation had complied with our statutes requiring the appointment of a resident attorney, when said corporation had fully complied with said statute before seeking the aid of our courts the legislature would not have declared that "such failure shall not affect the validity of any contract with such corporation," and proceeded with the language, "but no action at law or suit in equity shall be maintained or recovery had by any such corporation on any contract made within this state in any of the courts of this state so long as it fails to comply with the requirements of said sections."

All of the plaintiff's exceptions are overruled and the case is remitted to the Superior Court for further proceedings.

Curtis, Matteson, Boss & Letts, for plaintiff. Ira Lloyd Letts, James Ira Shepard, of counsel. Waterman & Greenlaw, for intervener. Ralph M. Greenlaw, Charles E. Tilley, of counsel.

CARRIE GOLDEN vs. R. L. GREENE PAPER Co. APRIL 12, 1922.

PRESENT: Sweetland, C. J., Vincent, Stearns, Rathbun, and Sweeney, JJ.

(1) Automobiles. Negligence. Proximate Cause.

In an action for personal injury by plaintiff being struck by a roll of paper which fell off a truck, which was being driven by defendant's servant, assuming that there might have been a lack of care in loading the truck, the proximate cause of the injury was in carrying the roll along the streets so insecurely placed upon the truck that it was likely at any time to fall therefrom, and evidence of negligence in this regard, would support the allegation in the declaration that defendant "so carelessly and negligently transported said merchandise that a roll of paper fell off said truck and struck said plaintiff."

(2) Pleading. Uncertainty. Verdicts.

Indefiniteness in the allegation of negligence is cured by verdict.

(3) Negligence. Pleading. Certainty.

Where merchandise being transported on a truck was in the exclusive control of defendant and the manner in which it was being transported was within the knowledge of defendant but unknown to plaintiff and the accident was one that does not ordinarily happen when due care is used, reasonable certainty on the part of plaintiff in stating his case only is required.

(4) Damages.

Although an impaired condition of health may have existed to some degree before an accident, if the injury arising from the accident aggravated that condition and rendered an operation necessary, plaintiff may recover for the expense of such operation.

TRESPASS ON THE CASE for negligence. Heard on exceptions of both parties. Exceptions of plaintiff overruled. Exception of defendant sustained as to amount of verdict.

SWEETLAND, C. J. This is an action of trespass on the case to recover damages for personal injuries alleged to have resulted from the negligence of the defendant's servant.

The case was tried before a justice of the Superior Court sitting with a jury and resulted in a verdict for the plaintiff in the sum of \$8,500. The defendant duly filed its motion for new trial. On this motion said justice decided that the damages awarded were excessive and that he would grant the motion unless the plaintiff should remit all of said verdict in excess of \$6,000. The case is before us upon the exception of each party to the decision of said justice.

It appears that the plaintiff while walking along the sidewalk on Broad Street in Providence, on the day when she received the injuries of which she complains, stopped at what is known as Jencks Alley to permit a delivery truck of the defendant to cross the sidewalk and enter said alley. While said truck was crossing the sidewalk a roll of corrugated paper fell from the side of the truck and struck the plaintiff. Said roll was thirty-six inches long, twenty-five inches in diameter and weighed seventy pounds. further appears that the top of the sideboards of the truck was fourteen inches above its floor, and that attached to the top of each sideboard was a so-called "bill" or shelf. nine inches wide, extending outward and slightly upward from the top of the sideboard. At the time in question the body of said truck, between the sideboards, was loaded with packages and rolls of paper, and four rolls of corrugated paper were placed upon the "bill" on either side of the truck. Each roll stood on end leaning slightly inward against the merchandise in the body of the truck. As the bill was nine inches wide and each roll was twenty-five inches in diameter a considerable portion of the bottom of each roll overhung the outer edge of the "bill". When the truck was loaded, each roll standing on the bill was secured solely by a rope attached to a hook in the body of the truck under the roll, which rope passed up and over the top of the roll, thence across the truck and over the top of the roll standing on the bill on the other side of the truck and thence downward where it was drawn taut and attached to another hook in the body of the truck. The plan of this method was to secure each roll by pressing and holding it firmly against the merchandise in the body of the truck. It is apparent that any shifting of the merchandise in the body of the truck would tend to slacken the rope over the top of the two rolls opposite each other, that the jar of the truck in passing over inequalities in the road would tend to shake a roll out from under the rope which bore only upon the outer edge of the top of the roll, and that a roll, if freed from the restraint of the rope, and standing nearly upright on the narrow outer shelf of the truck would be likely to fall from the truck when it was in motion. was one of the rolls which had been standing on the bill, that fell off and struck the plaintiff.

The plaintiff made the following allegations of negligence in her declaration: "The defendant, its agents and servants so carelessly and negligently managed, controlled and operated said automobile and transported said merchandise that a roll of paper fell off said truck and struck said plaintiff in the abdominal region with great force and violence while she was walking along said sidewalk and in the exercise of due care."

One of the defendant's grounds for new trial set out in its motion is as follows: "Second, because the evidence fails to show that the defendant was guilty of the alleged negligence." Relying upon that ground the defendant urged before said justice in support of its motion and has urged here upon its exception to the decision of said justice

that the evidence would not warrant a finding that the fall of the roll of paper which struck the plaintiff was the result of any act of the defendant's servant in managing, controlling or operating said motor truck or in transporting said roll. The defendant does not admit that the evidence showed negligence on its part in loading the truck, but it contends that if there was any evidence tending to show a lack of care on its part it was in the manner of loading said truck and not in the manner of transporting said roll of paper as is alleged in the declaration. We cannot sustain (1) this position of the defendant. If it might properly be found that there was a lack of care in loading said truck at the defendant's warehouse, such negligence would not be the proximate cause of the plaintiff's injuries. The defendant's negligence towards the plaintiff, if it was guilty of any, was in carrying the said roll of paper along the public streets and particularly across the sidewalk in front of the plaintiff so insecurely placed upon the truck that it was likely at any time to fall therefrom. If the jury might properly find the defendant negligent in this regard then the evidence may be regarded as tending to support the allegations of the declaration that "the defendant, its agents, and servants so carelessly and negligently transported said merchandise that a roll of paper fell off said truck and struck said plaintiff." The defendant did not by demurrer or otherwise before trial object to the allegations of the declaration for uncer-(2) tainty and if there is indefiniteness in the allegations of negligence such defect would be cured by the verdict. however as the merchandise on the truck was in the exclusive control of the defendant and the manner in which it was being transported was within the knowledge of the defendant but unknown to the plaintiff and as the (3) accident is one that does not ordinarily happen when due care is used the plaintiff in setting out the circumstances

We would not disturb the jury's verdict, approved by said justice, if the amount of the damages awarded appeared

and the happening of the accident has stated a case with

reasonable certainty.

to us to be just. 'Upon an examination of the evidence we think said justice was warranted in his decision that the damages awarded to the plaintiff were excessive.

It appears that several months after the accident the plaintiff was operated upon surgically to correct conditions existing in her organs of reproduction. As to whether or not such conditions resulted from the accident the testimony of the expert medical witnesses is conflicting. There was evidence from which the jury might find, as appears to be the opinion of said justice, that although said condition existed in some degree before the accident her injuries arising from the accident aggravated that condition and rendered the operation necessary. On the basis of that conclusion damages may be awarded to the plaintiff fairly. After deliberation we are of the opinion however that (4) even the amount of damages fixed upon by said justice in his decision is largely in excess of what would be liberal compensation for the injuries received by the plaintiff and the pain and suffering to which she was subjected as a result of the accident. We have fixed upon four thousand dollars as a just amount.

The plaintiff's exception is overruled. The defendant's exception to the decision of said justice upon the motion for new trial is sustained. The other exceptions of the defendant are overruled. The case is remitted to the Superior Court for a new trial unless on or before April 18, 1922, the plaintiff files in the office of the clerk of the Superior Court for the counties of Providence and Bristol a remittitur of all of said verdict in excess of four thousand dollars. If such remittitur is filed, the Superior Court is directed to enter judgment for the plaintiff in the sum of four thousand dollars.

Sol. S. Bromson, James J. Nolan, for plaintiff.

Ralph T. Barnefield, Pirce & Sherwood, Sidney Clifford, for defendant.

LOUIS R. GOLDEN VS. R. L. GREENE PAPER CO.

APRIL 12, 1922.

PRESENT: Sweetland, C. J., Vincent, Stearns, Rathbun, and Sweeney, JJ.

(1) Husband and Wife. Right of Consortium. Negligence. Damages. Elements of Damage.

In an action by a husband to recover damages for injuries to his right of consortium in consequence of personal injuries to the wife through defendant's negligence, the loss of sexual intercourse with his wife does not constitute an element of damage, but the basis of recovery is the loss of services and is restricted to that element of the consortium together with the loss to his estate in connection with the expenses to which he has been put by reason of her disability.

TRESPASS ON THE CASE for injury to plaintiff's right of consortium. Heard on exceptions of defendant and sustained.

SWEETLAND, C. J. This is an action of trespass on the case to recover damages for injuries to the plaintiff's right of consortium in consequence of personal injuries alleged to have been received by his wife through the negligence of the defendant's servant.

The case was tried before a justice of the Superior Court sitting with a jury and resulted in a verdict for the plaintiff in the sum of four thousand two hundred and fifty dollars. The defendant duly filed its motion for new trial which was denied by said justice. The cause is before us upon the defendant's exception to the decision of said justice upon its motion for new trial.

The alleged negligence of the defendant resulting in injuries to the plaintiff's wife has been considered in our opinion rendered in the case of Carrie Golden vs. R. L. Greene Paper Co., 44 R. I. 226. The jury's verdict in this case, supported by the decision of said justice, would not be disturbed by us if we did not consider the damages awarded to be excessive. The plaintiff testified to a money loss up to the time of trial of nine hundred and fifty nine dollars resulting from his wife's condition due to the accident.

This consisted of expenditures for the professional services of physicians and surgeons, for hospital charges and nurses' compensation, for the hire of automobiles and for servants' hire in his household. There was evidence also from which it might be found that after the trial it would be necessary for the plaintiff to make some further expenditures for medical attendance upon his wife and for extra domestic servants' hire. We think from the testimony that the sum of twelve hundred dollars will amply cover the plaintiff's damages due to the loss of his wife's services and to the expense to which he has been or will be put by reason of said injuries to his wife.

At the trial both the plaintiff and his wife testified that

as a result of the wife's injuries the plaintiff was not able to have "marital relations" with his wife. In considering the amount of damages awarded said justice in his decision upon the motion for new trial said, "Testimony was given of impairment of her capacity for sexual intercourse. matter was dwelt on in argument. From the fact that she has to a great extent resumed the sort of work she did before the accident and from the size of the verdict it is (1) evident that the testimony to this condition heavily enhanced the damages awarded." In argument before us counsel for the plaintiff has urged that the plaintiff's loss of sexual intercourse with his wife is a proper element of damage for which he should be awarded compensation. It quite clearly appears, and such was the view of counsel, . that a considerable part of the verdict was based upon a finding that by reason of his wife's injuries resulting from the accident the plaintiff had been deprived of the exercise of this element of his right of consortium and that the jury had given compensation therefor. The question is thus clearly presented to us as to whether such loss constitutes an element of damage for which the plaintiff can have recovery in this action.

The term "consortium" refers to the aggregate of the elements of conjugal fellowship and assistance which arise

to either spouse from the marriage relation. In either it involves the right to the companionship, solace and affection of the other and undoubtedly includes that incident of the marital relation which we are now considering. Although these are sometimes referred to as the sentimental elements of consortium, they are undoubtedly substantial and vital factors in producing and sustaining the union to the advantage of each spouse. With respect to the husband, consortium also includes his right to receive the wife's services about his household and her assistance in the education and care of his children.

In case of the alienation of the affection of either husband or wife the wrongdoer has directly and maliciously invaded this right and destroyed its enjoyment. The wrong is committed directly against the injured spouse. gravamen of the action for alienation of affection is not the loss of service but the loss of conjugal society and cohabita-The action exists in favor of the wife as well as the husband, and damages are given against the wrongdoer as punishment for the wrongful act. The law does not attempt to measure the pecuniary loss and give damages as In such action it is considered that it is to compensation. what we have termed the sentimental side of the consortium that legal injury has been done. The Supreme Court of Connecticut in Marri v. Stanford &c. Co., 84 Conn. 9, said: "In some cases, as where the wrong was criminal conversation, the loss of conjugal society and affection might stand out and be emphasized as the preëminent and possibly sole basis of recovery."

When a wife has been injured by the negligent act of another, there has not been an intentional wrong committed against the husband. There cannot be said to be a direct injury to other than the practical and material elements of his right of consortium. A husband has a right of action but his recovery must be of compensation and is not given by way of punishment. In reference to the measure of damages in such action courts have frequently said that the

husband can recover for the injury to his consortium but within that term is the husband's right to the services of his wife, and it is solely for that and for his expenses that recovery has generally been permitted. In Furnish v. Missouri, &c. Co., 102 Mo. 669, the court held that a husband is entitled to be compensated for the loss of his wife's society resulting from the defendant's negligence and said, "By the term 'society' in this connection is meant such capacities for usefulness, aid and comfort as a wife which she possessed at the time of the injury." From an examination of the opinion of other courts it seems plain that the great weight of authority is that in this class of cases whatever may be the general language used by the courts as to the nature of the husband's damage, the basis of his recovery, is his loss of the services of the wife growing out of her injury and is restricted to that element of the consortium, together with the loss to his estate in connection with the expenses to which he has been put in consequence of her disability.

The law will not attempt to fix pecuniary compensation in favor of the husband for the indirect effect which the wife's injuries may have had upon the sentimental side of the consortium. This is particularly true with reference to that element of consortium which we are now considering. Courts will not conduct an investigation for the purpose of fixing a monetary estimate upon the extent of such loss.

Although the language of their opinions is not explicit, courts in some instances appear to deny recovery to the husband on the ground that the wife has recovered or may recover for the same matter in her action for damages arising from her injury. We do not base our determination upon that ground, as in our view the wife's recovery does not include the personal loss of which the husband complains. The governing principle seems to us to be rather that this loss to both husband and wife is of a nature which courts will not attempt to compensate in pecuniary damages. If by reason of the negligence of a defendant there has

been an injury to a woman's sexual organs; impairing their functions, the extent of the impairment may well be considered in determining the amount of compensation which should be awarded to her for the injury, just as would properly be done with respect to the impairment of the functions of any other organ of her body. The woman would recover for the diminution of those particular physical powers; but the court will not attempt to measure the loss which she may have suffered by being unable to exercise those powers for any period; nor will it measure the loss to her husband arising indirectly from the same cause.

With us the elements of a husband's damage resulting from his wife's injury due to the negligence of a defendant are restricted to compensation for the loss of his wife's services and to his expenses in caring for his wife and in attempting to cure or repair her injury.

In Larisa v. Tiffany, 42 R. I. 148, the plaintiff finds language from which he argues that this court does not intend in actions of this kind to limit a husband's recovery as we have just set forth. The point under consideration in that case was as to whether a husband, who had been deprived of his wife's services in consequence of her personal injuries due to a defective highway, could properly be said to have suffered "damage to his property" within the meaning of Section 15, Chapter 46, General Laws 1909. The court was considering the nature of consortium generally and not the measure of damages for an injury to any of its elements. In said opinion authorities were cited which appeared to support the court's position that consortium was a property right. It chanced that the cases referred to were for alienation of affection, but the purpose of their citation by us was their general treatment of the question which we had under discussion in accordance with the view of this court. We had no intention of extending the scope of a husband's recovery in the class of actions now under consideration so that it should include damages for injury to the sentimental as well as the practical side of his right of consortium.

We are of the opinion that the sum of twelve hundred dollars will afford ample compensation to this plaintiff for such injuries as the evidence shows he has suffered or is likely to suffer by reason of the negligence of the defendant, and for which he is entitled to recover.

The defendant's exception is sustained. The case is remitted to the Superior Court for a new trial unless on or before April 18, 1922, the plaintiff files in the office of the clerk of the Superior Court for the counties of Providence and Bristol a remittitur of all of said verdict in excess of twelve hundred dollars. If such remittitur is filed the Superior Court is directed to enter judgment for the plaintiff in the sum of twelve hundred dollars.

Sol. S. Bromson, James J. Nolan, for plaintiff.

Ralph T. Barnefield, Pirce & Sherwood, Sidney Clifford, for defendant.

WALLACE L. WILCOX vs. Frank H. Swan et al, RECEIVERS. DAVID P. MORRIS, vs. Frank H. Swan et al, RECEIVERS.

APRIL 18, 1922.

PRESENT: Sweetland, C. J., Vincent, Stearns, Rathbun, and Sweeney, JJ.

(1) Automobiles. Contributory Negligence.

One who drives his automobile upon a trolley track at a time when he knew or ought to have known that a trolley car was rapidly approaching and that if any mischance, such as stalling the car occured he could not escape a collision is guilty of contributory negligence.

(2) New Trial.

On motion for new trial the trial court is justified in considering and it is his duty to consider the credibility of witnesses and what in his view is the preponderence of the evidence and if he believes the verdict to be unjust he should grant a new trial.

TRESPASS ON THE CASE for negligence. Heard on exceptions of plaintiffs and overruled.

RATHBUN, J. Each of these cases is an action of trespass on the case for negligence and involves the consideration of a collision between a street car operated by the defendants and an automobile owned by plaintiff Wilcox and operated at the time of the collision by plaintiff Morris. Wilcox brings suit to recover for damage to the automobile and Morris seeks to recover for personal injuries.

The cases were tried in the Superior Court before the same justice but with different juries. A verdict was rendered in favor of Wilcox for \$1,850. and in favor of Morris for \$1,439.50. A motion was made in each case on the usual grounds for a new trial. Said justice granted a new trial in each case.

Each case is before this court on an exception to the decision of said justice granting a new trial.

The accident occurred in the daytime. Just before the collision plaintiff Morris attempted to drive from Elmwood avenue across the car track into a private driveway leading to an automobile service station conducted by plaintiff Wilcox. Elmwood avenue is a wide street which, at the place of the collision, runs in a northerly and southerly course. The traveled part of the highway between the street curb lines is about forty feet in width. Outside of the traveled portion of the highway on each side of the street is a single track which is located between the curb line of the traveled portion of the street and the sidewalk. On each side of the street between said street curb line and the car track is a strip of land about six feet in width, upon which at varying distances from each other are trolley poles, electric light poles and trees. The track on the west side is used for southbound cars and that on the east side is used for northbound cars. The collision occurred about two hundred and ninety feet south of Adelaide avenue. which intersects Elmwood avenue. At the point of the accident is a private driveway through the grass plot over the car track and side walk to an automobile service station conducted by plaintiff Wilcox. When plaintiff Morris (1) turned the automobile from Elmwood avenue into this driveway the engine of the automobile stalled while it was crossing the track and an electric car which was proceeding

south, the direction in which the automobile was going immediately before it turned to enter the driveway, collided with the automobile which was stationary upon the car track. The plaintiffs contend that when the automobile stalled upon the track the electric car was a sufficient distance away to enable the motorman to avoid the collision by stopping the car and that his failure to do so was negligence. Plaintiff Morris, the operator of the automobile, testified that he thought the motorman deliberately ran the electric car into the automobile. Neither Morris nor any other witness for the plaintiff could state what the motorman did or failed to do to stop the car. Several witnesses testified that the automobile without warning suddenly turned toward the driveway and drove upon the car track when the electric car was but a short distance away and that the motorman when the automobile turned toward the track reversed the power and apparently did everything possible to avoid the collision. The operator of the automobile when he attempted to cross the track had a clear view of the track for a distance of nine hundred feet. At the trial of the Wilcox case, which was tried before the Morris case, Rodman L. Nichols, an employee of said Wilcox, was called to corroborate the testimony of Morris that the electric car was a considerable distance away when the automobile stopped upon the track but in view of the variation between his testimony given at the first trial and his testimony one week later at the second trial, we think said justice was justified in finding that his testimony was untrustworthy. Said justice considered that the story related by plaintiff Morris was improbable. In his rescript the justice said: "The story of Morris is improbable, viz: that a motorman in full view of an automobile standing on the track at a distance of from, say, 530 to 310 feet, should continue on his course, making no effort to stop the car until actually upon the automobile. The motorman had been in the service 11 years and his experience, we may fairly assume, would have deterred him from proceeding as Morris claims." . . "The Court feels that Mr. Morris was guilty of contributory negligence in driving his sedan upon the trolley track at a time when he knew, or ought to have known, that a trolley car was rapidly approaching and that if any mischance, such as stalling his car, occured he could not escape a collision. In Reddington vs. Getchell 40 R. I. 463, at 468, this court said: "Upon motion for a new trial made by a party who is dissatisfied with the verdict rendered by a jury, a justice who presided at the trial is justified in considering, and it is his duty to consider, the credibility of witnesses and what, in his view, is the preponderance of the evidence; if he believes the verdict to be unjust he should set it aside and grant a new trial."

After a careful reading of the transcript we find nothing which indicates that the trial justice was not fully warranted in granting a new trial in each case on the ground that the verdict was against the preponderance of the evidence.

Exception of the plaintiff in each case is overruled and each case is remitted to the Superior Court for a new trial.

McKenna & Boudreau, for plaintiff.

Clifford Whipple, Alonzo R. Williams, for defendant.

HANNAH M. A. HATHAWAY, vs. CARRIE F. REYNOLDS. APRIL 19, 1922.

PRESENT: Sweetland, C. J., Vincent, Stearns, Rathbun, and Sweeney, JJ.

Where on petition for new trial, on the ground that one of the jurors was not indifferent in the cause and had held a conversation with the husband of the plaintiff during the course of the trial the trial court passed on the question and denied the petition his action will not be disturbed unless it is shown that he abused his discretion.

(2) Evidence. Rumor.

The admission of testimony as to a rumor around a neighborhood in regard to certain facts and that it was rumored that the gossip had its origin with defendant, constituted reversible error.

⁽¹⁾ Jurors. New Trial.

(3) Evidence. Remoteness.

Evidence in an action for slander that defendant had at some time between six and ten years before the time alleged in the declaration made certain statements was too remote to be admissible, where it did not appear that defendant had thereafter habitually made similar statements up to within a reasonable time before the date alleged in the declaration.

TRESPASS ON THE CASE for slander. Heard on exceptions of both parties. Exception of plaintiff overruled and exceptions of defendant sustained.

RATHBUN, J. This is an action of trespass on the case for slander. The trial in the Superior Court resulted in a verdict for the plaintiff for \$1,500. The defendant made a motion for a new trial. The trial court refused to disturb the findings of the jury on the question of liability but found that the amount of damages awarded was not supported by the evidence and granted a new trial unless the plaintiff should remit all damages in excess of \$1,000. The plaintiff did not file a remittitur but excepted to the decision of said justice.

The case is before this court on plaintiff's exception to the decision granting a new trial and on defendant's exception to the refusal of said justice to grant a new trial without condition; also on certain exceptions of the defendant taken to the rulings of the court during the trial.

The declaration alleges that the defendant in the presence and hearing of divers persons charged the plaintiff, a married woman and mother of children, with adultery and unchastity, by addressing the plaintiff as follows: "You haven't a young one that belongs to your own husband."

The plaintiff and defendant are sisters. On Sunday morning, July 4th, 1920, the plaintiff accompanied by two children and Mrs. Sarah E. Abbott, whose husband was a cousin of the parties, called at the back door of the defendant's home, which is in a rural section. The defendant invited the visitors to enter the house but the invitation was declined. It is clear from the testimony that the parties quarreled almost continuously from the beginning to

the end of the visit, which occupied a period of about ten minutes. The plaintiff contends that during the course of the visit the defendant uttered the words of which she complains. The defendant and her husband denied that the words of which the plaintiff complains were spoken by the defendant.

The defendant's motion for a new trial was made on the usual grounds and also on the ground that Charles G. Cherry, one of the jurors on the panel which tried the case, was a second cousin of the plaintiff's husband and also on the ground that the plaintiff's husband held a conversation with said juror at some time during the course of the trial. It appears that the defendant did not learn until after the verdict was rendered that the juror Cherry was a cousin of plaintiff's husband. Affidavits were filed stating that no friendly or social relations existed, or ever existed, between either the plaintiff or her husband and said Cherry. The trial justice found that the juror Cherry was "indifferent in the cause." If said justice had made the same finding when the juror was called it would have been within the discretion of said justice to permit the juror to serve. G. L. 1909, Chap. 279, Section 37, is as follows: "The court shall, on motion of either party in a suit, examine on oath a person who is called as a juror therein, to know whether he is related to either party, or has any interest in the cause, or has expressed or formed an opinion, or is sensible of any bias or prejudice therein; and the party objecting to the juror may introduce any other competent evidence in support of the objection. If it appears to the court that the juror does not stand indifferent in the cause, another shall be called in his stead for the trial of that cause." affidavits were presented by both parties said justice carefully considered the question whether the juror's relation-(1) ship to the plaintiff's husband caused the juror to "stand" not "indifferent in the cause." It was his duty to pass upon this question and nothing has been suggested to indicate that he abused his discretion in refusing to grant a new trial on this ground. Said Section 37 is substantially the same as a statute in force in Massachusetts. In Woodward v. Dean. 113 Mass. 297, the defendant after verdict for the plaintiff discovered that one of the jurors on the panel which rendered the verdict was the husband of the The court said: "The evident object of plaintiff's niece. this enactment is that the question whether the jurors summoned can impartially try the case shall be ascertained and determined before the trial proceeds. A party against whom a verdict has been rendered, who has not seasonably availed himself of the means of inquiry thus afforded him, may indeed, upon proof to the satisfaction of the court that a juror did not stand indifferent, by reason of facts unknown to the party until after the verdict, be granted a new trial or review at the discretion of the court: but he is not entitled to it as matter of law, and has no right of exception if it is refused," citing authorities. See State v. Congdon, 14 R. I. 458.

The conversation between the plaintiff's husband and the said juror was of short duration and in a public waiting room at a railroad station in the presence of numerous witnesses. It does not appear that the cause between the parties was mentioned or that any attempt was made to tamper with the juror. In his rescript the court said: "The Court is of the opinion that neither the relationship nor the conversation in any way affected the result arrived at by the jury, and feels that the motion for a new trial on this ground should be denied."

The defendant excepted to the admission of the following testimony given by the plaintiff: "Q. Can you state whether or not there was a rumor or has been a rumor,—strike that out please—whether or not, Mrs. Hathaway, there has been a rumor in and around Slocum's as having originated with your sister to the effect that your children were not fathered by your husband? A. Yes, sir. Q. And had that rumor been called to your attention on more than one occasion before July 4th, 1920? A. Yes, sir." Rumor

has even less probative value than hearsay which has the (2) merit, at least, of stating the author of the tale which is repeated The effect of this testimony is not only that there had been a rumor that the plaintiff's husband is not the father of her children but also that it is rumored that the gossip had its origin with the defendant. The admission of this testimony was error and was prejudicial to the defendant. See 16 Cyc. 1213,

Defendant also excepted to the testimony to the effect that the defendant had at some time between six and ten years before the time alleged in the declaration stated that the plaintiff's husband was not the father of one of her (3) children. Such testimony was too remote to be admissible as it did not appear that the defendant had thereafter habitually made similar statements up to within a reasonable time before the date alleged in the declaration.

Plaintiff's exception is overruled, said exceptions of the defendant to the admission of testimony are sustained and the case is remitted to the Superior Court for a new trial.

Huddy, Emerson & Moulton, for plaintiff. Benjamin W. Grim, for defendant.

IDA HURVITZ vs. HARRY HURVITZ.

APRIL 19, 1922.

PRESENT: Sweetland, C. J., Vincent, Stearns, Rathbun, and Sweeney, JJ.

(1) Divorce, Jurisdiction. Allowance.

The superior court is made the divorce court of the state with exclusive original jurisdiction, of the matter of allowances for counsel fees, alimony and support of children, and the supreme court acts in these matters simply as an appellate court to review alleged errors of the superior court in specific rulings and decisions.

(2) Divorce. Jurisdiction. Allowance and Counsel Fees.

While a petition for divorce is in the supreme court on exceptions, motion for additional counsel fees must be made in the superior court, which retains its jurisdiction and if necessary the papers can be returned temporarily to the lower court.

Petition for Divorce. Heard on motion of petitioner for additional counsel fees and denied without prejudice to renewal in Superior Court.

Stearns, J. The original proceeding is by a petition for divorce and included therein is a prayer that petitioner be awarded the custody of a minor child and an allowance for support of petitioner and said minor child out of the estate of her husband, Harry Hurvitz. In the Superior Court, on motion of petitioner, the respondent was ordered to pay petitioner's attorney a certain amount for counsel and witness fees. A decision for divorce was later given in favor of the petitioner, with the custody of the minor child and an allowance for support of petitioner and her child. To this decision exceptions were taken and the cause is in this court on respondent's bill of exceptions.

The petitioner now moves in this court that she be awarded additional counsel fees. This motion is made on the theory that as the cause is now in this court on appeal (1) and as the papers in the case are also here, the Superior Court for the time being has lost all jurisdiction of the subject matter. This assumption is incorrect. 6, Chapter 273, General Laws 1909, it is provided that the Superior Court shall have exclusive original jurisdiction, except as otherwise provided by law, of petitions for divorce, separate maintenance, alimony and custody of children. The Superior Court is thus made the divorce court of the state with exclusive original jurisdiction. The proceedings in divorce are purely statutory (Sammis v. Medbury, 14 R. I. 214 Warren vs. Warren, 36 R. I. 167) and by Section 1, Chapter 289. General Laws it is provided that the practice shall follow the course of equity so far as the same is practicable. The establishment and development of rules of practice are thus left to the court with the power to adopt such procedure, either in law or equity, as is best fitted to accomplish the purpose of the statute. Certain rules have now been established. An appeal does not lie from a final

decree in a petition for divorce. Fidler v. Fidler, 28 R. I. 102. An appeal does lie from a decree on a petition for alimony, filed after the entry of a final decree in divorce. Wilford v. Wilford, 38 R. I. 55; Phillips v. Phillips, 39 R. I. A petition for divorce is a "civil action" within the meaning of that phrase as used in General Laws. Chapter 298, Section 8, to this extent, that legal questions which arise during the trial of a cause are subject to review in this court upon bill of exceptions. Thrift v. Thrift, 30 R. I. 357. In the Thrift case it was also held that the entry of final decree in a divorce cause is equivalent to the entry of judgment therein and that exceptions consequently will not lie after the entry of final decree. Baker v. Tuler. 28 R. I. 152. Section 14, Chapter 247, provides that the Superior Court may regulate the custody and provide for the education, maintenance and support of children of all persons divorced by said court or petitioning for a divorce; may in its discretion make such allowance to the wife out of the estate of her husband for counsel fees, in case she has no property of her own available, as it may think reasonable and proper; and the court may make all necessary orders and decrees concerning the same and the same, at any time, may alter, amend and annul for sufficient cause after notice to the parties interested therein. By Chapter 1532, Public Laws 1917-1918, Section 5, Chapter 247 General Laws was amended and express power to amend, alter or annul at any time decrees for the payment of alimony was conferred upon the Superior Court. The Superior Court has exclusive original jurisdiction of the matter of allowances for counsel fees, alimony and support of children. As orders for such payments are based on the necessity of the wife or children and as such orders are expressly made subject to change at (2) any time by the Superior Court to meet the changing conditions of the parties or their children, it is manifest that the jurisdiction to make a necessary change must exist and continue in the Superior Court or the Supreme Court. The latter court acts in these matters simply

as an appellate court to review alleged errors of the Superior Court in specific rulings and decisions. The transfer of the papers to this court does not deprive the Superior Court of its jurisdiction. If needed at any time the papers can be returned temporarily to the Superior Court upon application made to this court. All such matters in divorce as require adjudication pending the decision of the appellate proceedings, continue within the jurisdiction of the Superior Court and are to be heard and decided by that court.

The motion for additional counsel fees should be made in the Superior Court. The motion in this court is denied without prejudice to the right of petitioner to bring a similar motion in the Superior Court.

Philip C. Joslin, Ira Marcus, for petitioner. Bellin & Bellin, for respondent.

CITY OF PROVIDENCE FOR BENEFIT OF PIERRE MICHAUD
vs.

VICTOR LAURENCE et al.

CITY OF PROVIDENCE FOR BENEFIT OF MARY ANNE MICHAUD vs.

VICTOR LAURENCE et al.

APRIL 19, 1922.

PRESENT: Sweetland, C. J., Vincent, Stearns, Rathbun and Sweeney, JJ.

(1) Jitney Bonds. Actions.

Cap. 93, ordinances of the City of Providence passed under the authority of Pub. Laws, cap. 1263, (1915), regulating the licensing and operation of motor buses, affects the operation of such motor vehicles only within the limits of the City of Providence, and has no extra territorial effect, and the bond required by said ordinance to be given to said city in order to procure a license to operate a motor bus, covers damages sustained on account of the negligence of the principal or his employees in the conduct of the business only within the limits of said city.

DEBT ON BOND. Heard on exceptions of plaintiff's to action of Superior Court sustaining demurrers to declarations and exceptions overruled.

Sweeney, J. These are actions of debt on the same bond brought in the name of the City of Providence by residents therein against Joseph O. Laurence as principal and Victor Laurence as surety, both of West Warwick in the county of Kent. The actions are brought by husband and wife and are based upon personal injuries received by her while riding as a passenger in an automobile operated by the defendant Joseph O. Laurence.

Each declaration averred that said defendant Joseph O. Laurence operated an automobile in the so-called jitney business between Warwick Center Square, West Warwick, and the city of Providence; that said Mary Anne Michaud boarded said automobile in West Warwick for the purpose of being transported to the city of Providence; and that while she was being transported in said automobile, over a public highway in the city of Cranston along the route to said Providence, said defendant so negligently operated said automobile that it collided with another automobile and said Mary Anne Michaud sustained severe bodily injuries.

The declarations also averred that July 2, 1920, the defendants signed, sealed, executed, and delivered their bond to the said city of Providence as obligee, for the purpose of enabling said Joseph O. Laurence to procure a license from the Board of Police Commissioners of said city to operate a motor bus in the business of transporting, in said city, passengers for hire, and undertook and agreed in said bond to pay all damages sustained by any person which might be caused by the negligent or unlawful action of said operator, or his agents, in the use or operation of said motor bus.

The defendants demurred to the declarations on the ground that they had not obligated themselves to pay for

any damages sustained in the city of Cranston. The demurrers were sustained by a justice of the Superior Court and the plaintiffs have brought the cases to this court upon their bills of exception, claiming that said action was contrary to law.

Chapter 1263 of the Public Laws, passed at the January Session, 1915, authorizes each city and town to regulate, by ordinance, the business of transporting, in such city or town, passengers for hire by means of any motor vehicle.

Acting under the authority conferred by said chapter, the city council of the city of Providence passed an ordinance providing for licensing motor buses and regulating the operation thereof in said city. Said ordinance is known as Chapter 93 and was approved May 19, 1915. among other things, that no person shall engage in the business of transporting in the city of Providence passengers for hire by means of any motor vehicle without first obtaining a special annual license for each vehicle employed by him in such business. It also provides that no person shall operate a motor bus in any street or public place in said city without first obtaining a special annual chauffeur's license therefor. The ordinance fixes the amount of such license fees and designates the Board of Police Commissioners of said city as the administrative body to issue said The ordinance contains many provisions regulating the operation of said motor buses upon any street or public place in said city.

Said ordinance also provides (Sec. 9) that no license shall be issued for any motor bus until there has been filed with said Board of Police Commissioners a bond running to the city of Providence in an amount to be computed at the rate of \$500.00 per seat of the passenger seating capacity thereof, with surety conditioned in substance to pay all damages sustained by any person injured in his person or property by any careless, negligent or unlawful act on the part of the principal named in such bond or his employees in the conduct of his said business, or in the use or operation

of such motor bus employed by him therein, and such bond shall be maintained during the term of the license and shall run until the liability thereunder has ceased.

The purpose of the General Assembly in passing said Chapter 1263 was to empower each city and town, desiring to do so, to regulate the business of transporting passengers for hire by means of motor vehicles. If a municipality does not wish to avail itself of the power to regulate such business within its confines, then any person may engage in said business therein without regulation, subject only to the general laws relating to the operation of motor vehicles. The ordinance passed by the city council of Providence affects the operation of such motor vehicles only within the limits of the city and has no extra territorial effect. bond required by said ordinance to be given to said city in order to procure a license to operate a motor bus is for the manifest purpose of giving a person injured by the negligent operation of such licensed motor bus, within the limits of said city, some opportunity to collect the damage sustained by him. To hold that a person, injured by the negligent operation of such motor bus outside of the limits of the city, could sue upon the bond given to said city might deprive a person injured by the same motor bus, within the limits of said city, of an opportunity to collect the damage sustained by him by suit upon said bond. The bond itself states that it is given for the purpose of enabling the principal to secure a license to operate a motor bus in said city, and the surety on the bond is only chargeable according to its strict terms and conditions. Two cases bearing upon this question are Bartlett et al. v. Lanphier et al., 162 Pac. Rep. 532, and Fischer v. Pollitt, 112 Atl. Rep. 305.

As the license to operate the motor bus under said ordinance is limited to the city of Providence, and the bond is conditioned to pay damages sustained on account of the negligence of the principal or his employees in the conduct of said business within the limits of said city, there was no

error in the action of the court in sustaining the demurrers to the declarations.

All of the plaintiff's exceptions are overruled and the cases are remitted to the Superior Court for further proceedings.

Archambault & Archambault, Joshua Bell, for plaintiff. John F. Murphy, for defendant.

JOSEPH PENNINGTON vs. JOHN D. GLOVER et al.

APRIL 20, 1922.

PRESENT: Sweetland, C. J., Vincent, Stearns, Rathbun, and Sweeney, JJ.

- (1) Landlord and Tenant. Covenants to Renew.
- A lease provided that at its termination "said lessors will execute to said lessees another lease to run for a period of five years or in lieu thereof, will pay said lessees the appraised value of such improvements as said lessees may at their own expense have added to said premises". At the end of the term lessees continued to occupy and paid the same rent for about twenty-one months without anything being done about a new lease or paying for improvements and then lessors gave notice to lessees to vacate.
- Held, that a covenant to renew in the absence of a covenant to accept confers a privilege which is an executory contract and until the exercise of the privilege by the party upon whom it is conferred he cannot be held for the additional term, and therefore as lessees never became bound to pay rent for another term of five years they never acquired the right to occupy for another such term.
- Held, further, that lessees became tenants from year to year which tenancy was terminated by the notice to quit under sec. 3, cap. 334, Gen. Laws. Quære; as to any rights of lessees in equity for specific performance.

TRESPASS AND EJECTMENT. Heard on exception of plaintiff and sustained.

RATHBUN, J. This is an action of trespass and ejectment.

In the Superior Court a trial by jury was waived and the justice who heard the cause rendered a decision for the defendants. The case is before this court on the plaintiff's exception to said decision.

On July 2, 1913, the premises in question were owned in fee simple by the plaintiff and his mother, Millie A. Pennington, one of the defendants. On said date the plaintiff and his mother by written lease leased said premises for a term of five years to defendant Glover and said Millie A. Pennington. Thereafter Millie A. Pennington conveyed subject to said lease her interest in said premises to the plaintiff.

Said lease contained a covenant as follows: "That at the termination of said period said lessors will execute to said lessees another lease to run for a period of five years, or in lieu thereof, will pay said lessees the appraised value of said improvements as said lessees may at their own expense have added to said premises."

The defendants, who did business as co-partners, paid the stipulated rent and occupied the premises during the full term specified in the lease. At the end of said term the defendants continued to occupy and pay the same rent as theretofore until March, 1920. Until the latter date nothing was said or done by the parties relative to "another lease" or the payment for the improvements which had been placed upon the premises by the defendants. On March 31, 1920, the plaintiff gave the defendants notice in writing to vacate the premises on or before July 2, 1920. The plaintiff in March, 1921, told the defendants that he would pay to them the value of the improvements which they had placed upon the premises but nothing was done to ascertain what the value of the improvements was.

The defendants contend that by the terms of the covenant above quoted the plaintiff was bound at the end of the term, either to pay for the improvements or renew the lease for a term of five years, and that as the plaintiff did not, either before or within a reasonable time, after the expiration of said five years, pay or offer to pay for said improvements the defendants became tenants for another term of five years. In other words, a new tenancy with the same terms for five years was created by the plaintiff's

failure to elect whether he would pay for the improvements or renew the lease.

The plaintiff seeks to place a different construction upon said clause. He contends that the words "another lease to run for a period of five years," does not mean "another lease with the same terms." He argues that the provision for executing "another lease" is nugatory and void for indefiniteness since said provision merely provides that the lessors shall execute "another lease" and fails to define the terms of such other lease. The plaintiff contends also that the defendants by remaining in possession and paying rent after the end of the term became tenants from year to year and therefore subject to being dispossessed after notice of three months in writing to vacate at the end of the year. See Sec. 3, Chap. 334, G. L. 1909.

The question arises whether a new tenancy with the

same terms for five years was automatically created when the defendants held over their term and the plaintiff failed (1) within a reasonable time to elect to pay for said improvements. It should be borne in mind that only the plaintiff had the right to choose whether he would pay for the improvements, or execute "another lease" and that had "another lease" been tendered it was optional with the defendants to accept or reject the new lease. "A covenant to renew, in the absence of a covenant to accept, confers a privilege, which is an executory contract, and until the exercise of the privilege by the party upon whom it is conferred he cannot be held for the additional term." "And the fact that a covenant of renewal is binding only upon the lessor does not deprive the lessee of electing whether he will enforce or decline the renewal." 24 Cvc. 995. As the defendants never became bound to pay rent for another term of five years it follows that they never acquired the right to occupy for another term of five years.

The defendants have never applied to the equity court for specific performance and we cannot in this action determine what, if any, equitable rights they now have. So far as this action is concerned we find nothing to distinguish this from the ordinary case where a tenant for a year or more holds over his term without a new contract with the landlord and thereby becomes a tenant from year to year unless the landlord elects within a reasonable time to hold him as a trespasser. The tenancy from year to year was terminated by a notice to vacate, as required by Section 3 of said Chapter 334.

The plaintiff's exception is sustained.

The defendants may, if they shall see fit, appear before this court on the twenty-sixth day of April, 1922, at 10 o'clock a. m. and show cause, if any they have, why judgment should not be entered for the plaintiff.

Tillinghast & Collins, for plaintiff.

Harold B. Tanner, Harold B. Staples, of counsel.

Thomas L. Carty, for defendant.

SWINEHART TIRE & RUBBER COMPANY

11.0

Broadway Tire Exchange, Inc.

APRIL 20, 1922.

PRESENT: Sweetland, C. J., Vincent, Stearns, Rathbun, and Sweeney, JJ.

(1) Contracts. Warranties. Notice of Defects.

In an action of assumpsit to recover the price for goods sold and delivered, the burden was on defendant to establish a breach of warranty and where aside from the question as to defective goods the jury were permitted to pass on the question as to whether defendant within a reasonable time notified plaintiff of the alleged defects and there was evidence on both points in favor of plaintiff the verdict approved by the trial court will not be disturbed.

(2) Contracts. Credits.

Where the contract between the manufacturer and jobber required the jobber on adjusting a claim with a customer to make a detailed record of the facts and send a copy to the home office not later than the following day and ship to the home office once in ten days the used product on hand received in making the adjustments and the jobber sent no reports and did not ship the used goods and made no claim for credits until after action brought by manufacturer his claim for credits was properly disallowed.

(3) Contracts. Credits.

Where the contract between a manufacturer and jobber provided that jobber should advertise the goods and would be given a certain credit, "all such advertising to be submitted and approved by the manufacturer" and no advertising was submitted by jobber for approval, he was not entitled to credit for the money paid for advertising.

(4) Contracts. Foreign Corporations. Resident Attorney.

Where a foreign corporation through its agent took an order in this state, executed by defendant in this state and by the foreign corporation outside the state, the contract was made outside the state and was not within the provisions of Gen. Laws, cap. 300, § 42, relative to the appointment of a resident attorney.

(5) Pleading. Foreign Corporations. Resident Attorney.

Want of capacity to sue should be set up by a plea in abatement and is waived by pleading to the merits.

Assumpsit. Heard on exceptions of defendant and overruled.

RATHBUN, J. This is an action of assumpsit to recover the balance of the purchase price of certain automobile tires and tubes. The trial in the Superior Court resulted in a verdict for the plaintiff for \$3,540.97. The case is before this court on defendant's exceptions to the admission and exclusion of testimony, to the refusal of the trial court to dismiss the case, and to the refusal of the trial court to grant to the defendant a new trial.

It is admitted that the defendant is indebted to the plaintiff. There appears to be no question as to the price which the defendant agreed to pay or as to the amount of goods delivered but the defendant contends that it is entitled to certain credits not given by the plaintiff and also entitled to recoup for breach of warranty.

The defendant contends that the damages awarded are excessive and that on this ground the defendant was entitled either to a new trial or a reduction of the verdict.

The first exception is to the refusal of the trial court to grant a new trial. The goods were warranted to be free from defects and merchantable. A short time after receiving the goods the defendant wrote to the plaintiff saying,

"We are pleased with the goods." Five or six months later when payment was demanded the defendant complained for the first time that a portion of the goods were defective. The tires were encased in paper wrappers and could not be examined without removing the wrappers. The burden was on the defendant to establish a breach of warrantv. It was a question for the jury to determine whether the goods were defective and the jury were permitted to pass (1) also upon the question as to whether the defendant within a reasonable time notified the plaintiff that the goods were defective. The jury evidently decided one or both of these questions adversely to the defendant. We think the jury would have been warranted in finding from the evidence that the goods were not defective and also that the defendant's complaint as to defects in the goods was not made within a reasonable time. G. L. 1909. Chap. 263. §9. provides: "But, if, after acceptance of the goods, the buyer fail to give notice to the seller of the breach of any promise of warranty within a reasonable time after the buyer knows, or ought to know, of such breach, the seller shall not be liable therefor."

The defendant contends that it is entitled to certain credits which the defendant allowed to customers in making adjustments relative to defective tires.

The contract between the parties contained the following provision: "The First Party (plaintiff) covenants and agrees with the Second Party (defendant) as follows, to wit:— . . . To give the Second Party the privilege of making adjustments on defective SWINEHART TIRES in accordance with instructions to be furnished by the Home Office of the First Party. It is understood however that the First Party reserves the right to withdraw said privilege at any time by giving Second Party notice of its intention to do so. In the event of any tires or tubes originally sold by the Party of the Second Part and later adjusted by the Party of the First Part direct to the consumer the party of the first part is to pass credit to the party of the second part

covering the difference between the Second Party's cost of said adjustment and the price collected from the consumer."

The "instructions furnished by the Home Office" were a part of the contract. Said instructions directed the defendant, on adjusting a claim with a customer relative to a defective tire to make a detailed record of the facts; send a copy of this record to the Home Office not later than the following day and ship to the Home Office once in ten days the used tires on hand received from the customers in making adjustments. The defendant sent no notice or reports of adjustments; neither did he ship said used tires to the Home Office. He made no claim for credits for adjustments until after the plaintiff sought to collect the balance due the plaintiff.

The defendant contends that it should have been given credit for one-half of the money expended for advertising. It was agreed between the parties that the defendant would

advertise Swinehart tires and that the plaintiff would credit the defendant with one-half the money expended in such advertising but not to exceed either five hundred dollars or one per cent of the net business received from the defendant by the plaintiff. The contract contained language as follows: "All such advertising to be submitted and (3) approved by the party of the first part," that is, the plaintiff. No advertising was submitted to or approved by the plaintiff. The defendant having failed to submit the advertising to the plaintiff and thereby having failed to get said advertising approved by the plaintiff, the defendant was not entitled to credit for money expended for advertising. The trial court did not err in refusing to grant

The eighth exception is to the refusal of the trial court to dismiss the case. When the testimony was concluded the defendant moved that the case be dismissed and argued that the plaintiff was a foreign corporation doing business

the defendant's motion for a new trial.

(4) within this state and attempting to enforce in the courts of this state contracts made within the state and that the plaintiff, not having appointed a resident attorney with power to accept process, was barred from recovery by the provisions of Section 42, Chapter 300, G. L. 1909. There was no proof that the plaintiff ever did business within this state as contemplated by said Chapter 300. The plaintiff's salesman came to Providence and took an order for a bill of goods. The contract between the parties was executed by the defendant at Providence and by the plaintiff at its Home Office in Ohio. The contract was made in Ohio. The statute has no application. Furthermore, want of (5) capacity to sue should be set up by a plea in abatement and is waived by pleading to the merits. Weaver Coal Co. v. Co-operative Coal Co., 27 R. I. 194.

We find no merit in the exceptions to the admission and exclusion of testimony and we find no reason for disturbing the verdict which has been approved by the trial court.

All of the defendant's exceptions are overruled and the case is remitted to the Superior Court with direction to enter judgment on the verdict.

Lyman & McDonnell, Thomas F. I. McDonnell, Arthur J. Levy, for plaintiff.

Frank H. Wildes, for defendant.

WILLIAM E. LOUTTIT vs. ALANSON ALEXANDER et al.

MAY 4, 1922.

PRESENT: Sweetland, C. J., Vincent, Stearns, Rathbun, and Sweeney, JJ.

(1) Statute of Adverse Possession.

Where the period required by the statute in order to obtain title by adverse possession had expired prior to the service of the statutory notice under Gen. Laws, 1909, cap. 256, § 6, such notice is of no importance in determining the question of adverse possession.

(2) Public User. Adverse Possession.

Where the matter of public user was not raised by the pleadings, in a bill in equity, the respondent resting solely upon his claim of a right of way, evidence to show a dedication to and acceptance by the public was inadmissible.

BILL IN EQUITY to remove cloud on title. Heard on appeal of respondents and decree of Superior Court with a certain modification, affirmed.

VINCENT, J. This is a suit in equity brought to remove a cloud upon the title of the complainant to certain real estate situated on Pawtuxet Neck in the city of Cranston.

The estate in question comprises a piece of land formerly used as a wharf and now a part of the complainant's lawn and garden, together with a strip of land about twenty-five feet in width bounded on the east by the wharf land, on the south by a platted way, on the west by Sea View avenue, and on the north by the remaining portion of the complainant's land.

The bill of complaint alleges that the complainant is, and for a long time has been, the owner in fee of lots one, two, and three on a plat known as the Benjamin Bogman plat, more particularly described as a "Plan of South end of Long Neck belonging to Benjamin Bogman, John Howe, C. E. July 15, 1873," which said plat was recorded on July 31, 1873 in P. B. 2B. p. 81 and also on Plat Card No. 60.

The twenty-five foot-strip comprises approximately the southerly half of the lots one, two, and three as delineated on said plat. The wharf property, so-called, is situated to the east of said lots and is shown as an open space on said plat.

The bill of complaint also alleges that the respondent Alanson Alexander is, and for a long time has been, the owner of lot thirty-one on said plat on the westerly side of Sea View avenue and somewhat to the south of the land of the complainant.

Annie S. Alexander, the wife of the respondent Alanson Alexander, having an inchoate right of dower in the lot of her husband was made a party respondent. She is now deceased.

The answer of the respondent Alanson Alexander does not allege that either the wharf or the strip of land was a public way or that the public had any rights therein. The respondent simply claims right of way in himself as appurtenant to his own land on the same plat. This right he asserted on May 12, 1919, by giving to the complainant a notice in writing under Section 6, of Chapter 256, Gen. Laws of Rhode Island, 1909, and causing such notice to be recorded in the office of the City Clerk of Cranston.

It appears from the evidence that all of the land in ques(1) tion now claimed by the respondent as being subject to his
right of way had been for many years fenced in by the
complainant and his predecessors in title as a part of the
adjacent land. In fact the period required by the statute
in order to obtain title by adverse possession had commenced to run subsequent to the time of the fencing and
had expired some years prior to the service of the statutory
notice, above referred to, on May 12, 1919, and therefore
such notice is without importance in determining the question of adverse possession.

After a hearing in the Superior Court a decree was entered in which it is recited that the complainant is the owner and is lawfully possessed in his own right, free and clear of all incumbrances, of the parcels of land described in his bill of complaint; and that the respondent Alanson Alexander has no right, title or easement in, to or over either of said parcels of land or any part thereof as appurtenant to lot number thirty-one on said plat or otherwise.

The respondent also claimed in the court below that the parcels of land involved in the present controversy had become subject to a public easement by dedication and therefore the complainant is not entitled to have removed the alleged cloud upon his title.

The complainant objected to the introduction of testimony bearing upon the matter of a public easement as that question was not raised by the pleadings in the case. The Superior Court however admitted testimony de bene tending to show public user of the land in dispute, considered such (2) testimony and further decreed that there has been no

acceptance by public user of any offer to dedicate either of said parcels or any portion thereof to public use, and that such offer, if any such existed, has been withdrawn so that said parcels of land are not now subject to any public right of way or use.

We think that inasmuch as the matter of public user is not mentioned in the pleadings the respondent, resting solely upon his claim of a right of way over the land in question, was not entitled to introduce testimony to show a dedication to and acceptance by the public. Such being our view a discussion of the questions of dedication and acceptance would be uncalled for although we may observe in passing that it does not appear to us that the testimony would have been sufficient to establish public user had its admission been warranted.

The recorded notice of the respondent is a cloud upon the complainant's title which would be likely to seriously interfere with his rightful enjoyment of his estate and the same should be removed. We think that the Superior Court was correct in holding that any rights which the respondent Alexander may have had as appurtenant to the land in question, solely by reason of being a lot owner on the plat, were long since extinguished by adverse possession.

The decree of the Superior Court should be modified by the elimination of the third paragraph thereof relating to public user. In all other respects the said decree of the Superior Court is affirmed.

The parties may present to this court a form of decree in accordance with this opinion.

Gardner, Moss & Haslam, Pirce & Sherwood, for complainant.

Morgan & Morgan, for respondent.

Francesco Caito vs. Vincent J. Ferri.

MAY 5, 1922.

PRESENT: Sweetland, C. J., Vincent, Stearns, Rathbun, and Sweeney, JJ.

- (1) Landlord and Tenant. Renewal of Lease. Extension of Lease. Election to Renew.
- A lease provided that lessee should have an option for a renewal for a further term and that if lessee "should ask for a renewal at the termination of five years from the date hereof, the conditions governing the extended period shall be the same with the exception" of the rent, and also provided that upon failure of lessee to pay any installment of rent within five days after the first of the month lessor should be at liberty to take immediate possession of the premises. Lessee two days after the original termination of the lease stated orally to lessor that he wished to renew the lease for the further period:—
- Held, that the only act that lessee was required to do was an election to continue the tenancy which he was not called upon to make prior to the termination of the lease, and a fair construction of the lease gave lessee a reasonable time after the termination of the lease to make such election, and the election within two days was within a reasonable time.
- Held, further, that the election was not required to be in writing.
- Held, further, that the agreement was one for the extension of the original lease rather than for a renewal of a lease to be evidenced by a new lease, although the option was expressed to be a renewal.
- (2) Landlord and Tenant. Extension of Lease.
- Where a lease provided for its extension at option of lessee, the tenant having made his election holds the premises for the full term under the original lease.

TRESPASS AND EJECTMENT. Heard on exceptions of plaintiff and overruled.

STEARNS, J. The action is trespass and ejectment to recover possession of certain premises on Atwell's avenue in Providence.

Defendant maintained a drug store on the premises and held the same under a written lease for a period of five years from November 1, 1916 to November 1, 1921. Plaintiff, the owner of the premises, bought the same in 1920 subject to the lease. By the terms of the lease it was provided that the lessee should have an option for a renewal of the lease for a further term of five years subject to the condition specified therein. The lease also contains the following

clause: "Should said lessee ask for a renewal of this lease at the termination of five (5) years from the date hereof as hereinbefore stated, the conditions governing the extended period shall be the same with the exception that the rent therefor, shall be six hundred (\$600) dollars per year payable in equal monthly payments of fifty (\$50) dollars each in the same manner as aforesaid." The rental was \$540 a year. payable in equal monthly instalments on the first business day of each month and it was further provided that upon failure of the lessee to pay any instalment within five days after the first of the month, the landlord, without making any demand for the rent, should be at liberty to enter upon the premises, declare the lease at an end and take immediate possession of the premises. There was also the usual coverant that the lessee at the expiration of the lease would quietly and peaceably surrender possession of the premises.

On the 3rd of November, 1921, defendant went to plaintiff's house and stated to plaintiff that he wished to continue as a tenant in the store for the further period of five (1) years. Plaintiff refused to permit this and claimed that defendant should have given notice of his election to continue not later than November 1st, and that the notice given was too late. On the following day, November 4, defendant tendered to plaintiff \$50 in payment for his rent for November. Plaintiff refused to receive the rent and served written notice upon defendant to quit on or before December 1st. The claim is that defendant having failed to give the required legal notice of his election, the landlord was entitled to treat him as a trespasser.

At the conclusion of the testimony, the trial justice, on motion made, directed a verdict for the defendant. Plaintiff's exception to this action is the sole question now raised by his bill of exceptions.

The lease contains all of the terms of the agreement between landlord and tenant for the tenancy for five years and for the subsequent tenancy. To entitle the tenant to the additional term of years but one act was required on his

part, namely, an election to continue his tenancy, which was not required to be made in writing. As the election was to be made at the termination of the lease the lessee could not be called upon to make an election prior to the termination of the lease. Neither do we think it was the intent of the parties to restrict the right of the tenant to elect, to the precise hour of the termination of the lease. By the terms of the agreement the termination of the lease was to precede in point of time the election by the tenant. As the tenant was to have some time in which to elect, and as the length of this period is not expressly provided for, a fair construction of the agreement is that it was the intent of the parties that the tenant was to have a reasonable time after the termination of the lease in which to make his election, and in the circumstances we think the election within two days was made within a reasonable time. The landlord had made no inquiries in regard to the tenant's intentions; the tenant was carrying on his business as usual and continued to do so. He was bound to pay his rent within five days, under penalty of losing his lease. the terms of the lease the tenant covenanted to surrender possession to the lessor at the expiration of the lease. he had remained in possession for any considerable length of time without notice to the landlord, it might perhaps fairly be argued that the landlord could properly consider such conduct as an election by him to continue as a tenant according to the terms of the agreement rather than in violation of the agreement. The agreement is one for the extension of the original lease rather than for a renewal of a lease to be evidenced by a new lease. It provides for the continuance of an existing and established relationship between the parties rather than for the creation of a new relationship. It is true that the option is expressed to be a renewal but it is also provided that should the lessee ask for a renewal the conditions governing the extended period shall be the same with the exception of the specified change (2) in rental. As this is an extension of the tenancy at the

option of the lessee, the tenant having made his election, holds the premises for the full term under the original lesse. 1 Taylor Landlord & Tenant, 406; 16 R. C. L., §. 389, and cases cited; *Holley* v. *Young*, 66 Me. 520; *Delashman* v. *Berry*, 20 Mich. 292.

Plaintiff's exception is overruled and the case is remitted to the Superior Court with direction to enter judgment on the verdict.

Benjamin W. Grim, for plaintiff. Pettine & De Pasquale, for defendant.

EMMA H. KIMBALL vs. MASSACHUSETTS ACCIDENT COMPANY. .

MAY 26, 1922.

PRESENT: Vincent, Stearns, Rathbun, and Sweeney, JJ.

(1) Liability Insurance. Death by "Accidental Means."

A policy insured a physician and surgeon against "loss or disability as herein defined, resulting directly, independently and exclusively of any and all other causes from bodily injury effected solely through accidental means."

The policy provided that "the insurance hereunder shall not cover any injury, fatal or non-fatal, sustained by insured while participating in or in consequence of having participated in aëronautics, from ptomaines or from disease."

Insured died from erysipelas, through an open boil becoming infected with the erysipelas germ. Deceased had treated erysipelas cases while suffering from the boil.—

Held, that the death of insured was the result of disease and not of bodily injury effected solely through accidental means.

(2) Liability Insurance. Death by "Accidental Means."

In determining that an injury occurred by "accidental means" it should appear that the cause or means governed the result and not the result the cause; and however unexpected the result might be, no recovery should be allowed under such a provision unless there was something unexpected in the cause or means which produced the result.

Assumpsit. Heard on exceptions of plaintiff and overruled.

Sweeney, J. This is an action of assumpsit to recover the amount due upon an accident insurance policy issued by

the defendant to Harry W. Kimball, July 16, 1914. The plaintiff is the beneficiary named in said policy and seeks to recover from the defendant on the ground that the death of Dr. Kimball was caused solely by accidental means within the terms of said policy. The action was tried by a justice of the Superior Court, jury trial having been waived, and decision was given for the defendant. The plaintiff has duly brought the case to this court upon her bill of exceptions and now claims that said decision was contrary to the law and the evidence and the weight thereof.

The policy insured Harry W. Kimball, by profession a physician and surgeon, against "loss or disability as herein defined, resulting directly, independently and exclusively of any and all other causes from bodily injury effected solely through accidental means." It contained many provisions and limitations one of which was that "the insurance hereunder shall not cover any injury, fatal or nonfatal, sustained by the insured while participating in, or in consequence of having participated in aëronautics, from ptomaines, or from disease."

The evidence proved that Dr. Kimball was a practicing physician specializing in dermatology; that he died March 28, 1920; and that the cause of his death was erysipelas.

The trial justice found that the deceased called Dr. Gifford, March 20, 1920, and complained of a boil on the back of his neck about where his collar button would come. He told the doctor that the boil had started about a week before and that he had been dressing and taking care of it himself. Dr. Gifford had treated the deceased for several abscesses prior to this time and recognized this one as being different from the others and concluded that erysipelas had developed. Dr. Richardson agreed with this diagnosis and both of these experts testified that erysipelas is an infectious disease, and that for a person to develop it he must pick up the particular kind of an organism that causes the disease by direct contact.

Against the objection of the defendant, Dr. Gifford was permitted to testify that the deceased told him that he had seen three erysipelas cases within a week before he called Dr. Gifford. The trial justice found that the plaintiff's proof did not show that the erysipelas was effected by accidental means, and that the open boil became infected with the erysipelas germ in some unknown way.

The plaintiff claims that Dr. Kimball received the infection from contact with an erysipelas germ while engaged in the treatment of patients suffering from erysipelas and that this infection was "bodily injury effected solely through accidental means." To support this claim, plaintiff cites the case of *Hood & Sons* v. Maryland Casualty Co., 206 Mass. 223 In this case the policy sued upon was entitled "Manufacturers Employers Liability Policy." The contract which it contained was one of indemnity in which the defendant engaged to make good to the plaintiff any loss or damage which it might sustain by reason of its liability to its employees for bodily injuries accidentally suffered by them while engaged in doing the work which they were employed to do. The insurance was liability insurance, so-called, and not insurance against accidents.

The liability insured against was that "imposed by law upon the assured for damages on account of bodily injuries or death accidentally suffered . . . by any employee." Plaintiff's employee, on duty as a hostler in its stables, contracted glanders and brought an action against the plaintiff for negligently putting him to work in the stable and thereby exposing him to the disease. Judgment was rendered in his favor and then plaintiff brought the present action to recover the amount paid from the insurance company. The question before the court was whether the injury to the employee was brought about accidentally, within the fair scope and meaning of the policy, or whether it was the result of disease contracted while in the employ of the plaintiff but for which the defendant was not liable. The court held that the infection which caused the disease from which the employee suffered was due to accident, saying: "It was in the nature of an accident that he was set to work upon or cleaning up after horses that had glanders, and it was in the nature of an accident that he became infected with the disease." The court held the defendant liable to pay the damages which the plaintiff had paid to its employee.

The later case of Smith v. Travelers Insurance Company, 219 Mass. 147, is more in point and is against the claim of the plaintiff. The court held that the plaintiff could not recover in an action brought on a policy of accident insurance wherein the deceased was insured against death resulting from "bodily injuries, effected directly and independently of all other causes, through external, violent and accidental means." It appeared that the deceased was using a nasal douche as he had been in the habit of doing; that he "snuffed" or drew breath into his nostril more violently than he usually did and consequently there passed through his nostril, and thence by way of Eustachian tube through a hole in the mastoid bone in the middle ear into his brain, streptococcus germs which caused his death from spinal meningitis. The court said, "there was nothing accidental in the inhalation of this douche. The deceased did exactly what he intended to do. This particular act of inhalation, though harder or more violent than usual, was not, so far as appears, harder or more violent than he intended it to be. There was no shock or surprise during the inhalation which made him draw a deeper breath than he intended to draw, nothing strange or unusual about the The external act was exactly what he circumstances. designed it to be, though it produced some internal consequences which he had not foreseen. Accordingly there was no bodily injury effected through a means which was both external and accidental. But it is only for a death resulting from injury effected through such means that the defendant is made responsible by the policy. It is not sufficient that the death or the illness that caused the death may have been

an accidental result of the external cause, but that cause itself must have been not only external and violent, but also accidental.

"We cannot find that there was any 'external, violent and accidental means' producing the injury which caused the death other than this inhalation by the deceased of the nasal douche, which he took, not accidentally in any sense of that word, but purposely, with full knowledge of its character, and in the very way in which he intended to take it."

(1) The defendant contends that the deceased died as the result of disease and that erysipelas causing his death was not "bodily injury effected solely through accidental means."

A case in point sustaining the defendant's contention is that of Bell v. State Life Insurance Co. (Georgia), 101 S. E. This was a suit on a policy of life insurance for Rep. 541. the recovery of the disputed double indemnity due for the death of the assured if it could be shown that his death resulted "from bodily injury sustained and effected directly through external, violent and accidental means exclusively and independently of all other causes." The petition stated that the insured was a physician by profession and that he attended professionally a child suffering from the disease known as ervsipelas. It also stated that the insured wore glasses and that in adjusting his glasses while attending said patient he accidentally caused a scratch or abrasion of the skin on or near his right ear, which scratch or abrasion of the skin became infected with the germs of the disease of erysipelas resulting in his death.

The court found that the evidence showed that the abrasion upon the ear occurred at the office of the deceased and that he continued to treat and come in immediate contact with the patient affected with erysipelas, living about two miles away, for several days thereafter; and that there was no direct or specific evidence tending to show that the fatal infection might have been contracted from germs,

collected upon the glasses, which entered the wound or scratch upon the ear at the time that the abrasion occurred.

The court held that if one who has knowingly sustained an accidental abrasion upon the exposed surface of his body thereafter continues to bring himself in contact with and treat a patient affected with a virulent type of contagious disease, such as is capable of being transmitted through immediate proximity with such exposed wound or abrasion, and as a result of such voluntary risk he thus becomes infected with and contracts the disease and it results in his death, the proximate cause thereof cannot properly be said to be the original "bodily injury" sustained and effected directly through violent, external and accidental means exclusively and independently of all other causes; and affirmed judgment for the defendant.

Another case upon the nonliability of the defendant is that of the Maryland Casualty Co. v. Spitz, 246 Fed. 817. L. R. A. 1918 C 1191, wherein the Circuit Court of Appeals held that death from erysipelas was not "accidental" within the meaning of a policy insuring against death by "accidental means" when it was caused by germs entering a boil when scratched by the unclean hands of the deceased. The court said the deceased seems to have done just what he intended to do, namely, to rub or scratch his neck to relieve the itching and in our opinion breaking the scab during the process was a probable result, one reasonably to be expected. court quoted from U.S. Mutual Accident Association v. Barry, 131 U. S. 100, as follows: "If a result is such as follows from ordinary means voluntarily employed in a not unusual or unexpected way, it cannot be called a result effected by accidental means."

In determining that an injury occurred by "accidental means" it should appear that the cause or means governed 2) the result and not the result the cause; and that, however unexpected the result might be, no recovery could be allowed under such a provision unless there was something unexpected in the cause or means which produced the result.

New Amsterdam Casualty Co. v. Johnson, L. R. A. 1916 B, note p. 1021.

In the case of Lehman v. Great Western Acc. Asso., 155 Iowa 737, 42 L. R. A. (N. S.) 562, the court said, in construing the phrase injury by "accidental means," "It is not sufficient that there be an accidental, that is, an unusual and unanticipated, result. The 'means' must be accidental; that is, involuntary and unintended."

The policy in this case provides that recovery for the death can be had only when the insured dies from bodily injuries effected solely through accidental means resulting directly, independently and exclusively of any and all other causes. When a man is injured while doing merely what he intends to do, he is not injured by an accident, unless the course of his action has been interrupted or deflected by some unforeseen or unintended happening.

The "bodily injury" the deceased had was an open boil or abscess and the primary question is, was this caused by "accidental means"? According to his statement to Dr. Gifford, he had been treating and dressing it for a week and there is no testimony to show that its open condition or infection was the result of "accidental means." The trial justice has correctly found that there is no testimony to show that the open boil was infected with the erysipelas germ by "accidental means". The infection of the boil by the erysipelas germ was not of the kind that naturally develops from the boil itself. Erysipelas was an independent and intervening cause of death. The testimony shows that the death of the insured was the result of disease and not of bodily injury effected solely through accidental means.

There is no error in the decision of the trial justice. The plaintiff's exceptions are overruled and the case is remitted to the Superior Court with direction to enter judgment for the defendant upon the decision.

William J. Brown, Archibald C. Matteson, for plaintiff. Edward C. Stiness, Daniel H. Morrissey, Christopher J. Brennan, for defendant.

EMMA H. KIMBALL vs. MASSACHUSETTS ACCIDENT COMPANY.

MAY 26, 1922.

PRESENT: Vincent, Stearns, Rathbun, and Sweeney, JJ.

(1) Equity. Appeal. Final Decree.

An appeal from a decree of the superior court denying a motion to vacate a final decree and for leave to file an amended or supplemental bill in the cause, brings before the court for review only such matters as are involved in the decree appealed from, and cannot bring up any alleged error contained in the final decree itself or any matters arising in the cause previous to the entry of the final decree.

(2) Equity. Appeal. Final Decree.

Where a bill of complaint was brought to set aside the substitution of a new policy for the original one, on the ground that the substitution had been procured by the fraud of respondent's agents and the court found against the complainant and dismissed the bill, and on motion to vacate the final decree no facts were stated warranting the court in setting aside the decree, the motion was properly denied.

BILL IN EQUITY. Heard on appeal of complainant from decree of Superior Court denying motion to vacate final decree and appeal dismissed.

SWEENEY, J. This is an appeal from a decree of the Superior Court denying complainant's motion to vacate a final decree theretofore entered by said court.

The bill of complaint averred that the complainant is the widow of Harry W. Kimball and the beneficiary under a policy of accident insurance issued by the respondent July 14, 1914, which provided, among other things, that in case of the death of Mr. Kimball, effected solely through accidental means, it would pay the beneficiary the sum of \$7,500.00; that said Harry W. Kimball died March 28, 1920, solely as a result of accidental means; that the complainant demanded payment of the amount of said insurance; that the respondent denied liability and refused payment, whereupon the complainant brought an action at law upon said policy in said Superior Court; and that said action was then pending in said court.

The bill also averred that after bringing said action at law the complainant discovered that at the time of the issuance of said policy, July 14, 1914, said Harry W. Kimball was carrying an accident policy issued by said company, September 29, 1910, which was then in full force and effect, in which she was named as beneficiary and which was more liberal in its terms and provisions for Mr. Kimball and her than said policy issued July 14, 1914.

The bill also averred that said Harry W. Kimball was induced by the respondent to consent to the substitution of the policy dated July 14, 1914, in lieu of the one dated September 29, 1910, by means of the fraud of the agents of said respondent, in that said agents fraudulently represented to said Kimball and induced him to believe that the substituted policy covered the same risks as the original policy and was in effect a renewal thereof except for an increased premium on account of the amount payable at death being materially increased. Whereas, in fact, under the terms of the original policy the insured was given a broader and more ample protection than under the substituted policy, and an additional limitation upon the liability of the respondent was contained in the substituted policy to the effect that "the insurance hereunder shall not cover any injury, fatal or nonfatal, sustained by the insured while partipating in, or in consequence of having participated in aëronautics, from ptomaines or from disease," and that this limitation would be a defense in said action at law upon said new policy.

The bill prayed that the substitution of the new policy in place of the original policy be declared to be a fraud upon the rights of said Harry W. Kimball and of the complainant as beneficiary, and that the original policy be ordered to be reinstated and declared to be the policy in force at the time of the death of said Harry W. Kimball in place of said new policy, and for other relief.

The respondent filed an answer denying that it or its agents had been guilty of any fraud or improper conduct

which constituted a fraud upon the rights of said Harry W. Kimball or of the complainant as beneficiary under said policy.

After hearing upon bill, answer, and proofs by the Presiding Justice of the Superior Court, a final decree was entered dismissing the bill. Several findings of fact were incorporated in the decree, one of which was that said Harry W. Kimball was not induced to consent to the substitution of the new policy for the original one by fraud or false representations or improper conduct upon the part of the respondent or of its agents.

The final decree dismissing the bill of complaint was entered April 22, 1921, and no appeal was taken therefrom. Within six months thereafter, namely, September 13, 1921, the complainant filed her motion that said final decree be vacated, that she be granted leave to file an amended or supplemental bill in said cause, and that such further proceedings might be had as justice and equity might require. After a hearing upon this motion a decree was entered November 10, 1921, denying the same and the complainant duly filed her claim of appeal therefrom. The reasons stated for the appeal are that said decree is contrary to the law and the evidence and should be reversed and that the court erred in its application of the law to the facts set out in the affidavit in support of said motion to vacate said final decree.

The complainant advisedly claimed no appeal from the final decree dismissing her bill of complaint as her solicitor states in his brief that he decided to await the result of the trial of the action at law and then, in case of an adverse decision, to move to vacate said final decree or file a bill of review.

A person aggrieved by a final decree in equity must claim [1] an appeal therefrom within thirty days from the entry thereof. Section 25, Chapter 289, General Laws, 1909. In discussing the right of appeal in an equity cause, this court said in *McAuslan* v. *McAuslan*, 34 R. I. 462, on page 473,

"if a party aggrieved by a decree may appeal, we think the weight of authority and regularity of procedure would require that he must appeal or lose his right to have the objectionable decree reviewed by this court."

The present appeal brings before the court for review only such matters as are involved in the decree appealed from and cannot bring before the court any alleged error contained in the final decree itself or any matters arising in the cause previous to the entry of the final decree. *McAuslan v. McAuslan, supra*, p. 474.

The motion to vacate said final decree is filed under authority of Section 2, Chapter 294, General Laws, 1909, which provides, among other things, that in case of decrees in all equity causes the court entering the same shall have control over the same for the period of six months after the entry thereof, and may, for cause shown, set aside the same, and reinstate the cause or make new entry and take other proceedings with proper notice to parties, with or without terms, as it may direct by general rule or special order.

The only additional facts contained in the affidavit filed (2) in support of the motion to vacate the final decree which were not introduced in evidence during the trial of the equity cause, prior to the decision and entry of the final decree, are to the effect that Dr. Kimball while suffering from a boil or abscess on his neck treated three erysipelas cases; that within a short period an infection of erysipelas developed in said boil or abscess which resulted in his death; that the defendant in said action at law claimed that erysipelas was the cause of Dr. Kimball's death; that erysipelas is a "disease"; and that the defendant was not liable under the provision in its policy which provided that it would not be liable for death "from disease."

It appears from the record that said action at law upon said substituted policy was tried before a justice of the Superior Court June 6, 1921, jury trial having been waived, and resulted in a decision, July 12, 1921, for the defendant upon the grounds that the death of the insured had not been

effected solely through accidental means and that it was not liable for death caused by "disease."

The bill of complaint was brought to set aside the substitution of the new policy for the original one on the ground that the substitution had been procured by the fraud of the agents of the respondent. The court found against the complainant on this issue and dismissed the bill.

In the affidavit filed with the motion to vacate the final decree no newly discovered evidence of fraud in procuring the substitution of the new policy for the original one is stated, nor are any other facts stated in the affidavit supporting said motion which would justify the court in setting aside said final decree.

The complainant's appeal is dismissed, the decree of the Superior Court appealed from is affirmed, and the cause is remanded to that court for further proceedings.

William J. Brown, Archibald C. Matteson, for complainant. Edward C. Stiness, Daniel H. Morrissey, Christopher J. Brennan, for respondent.

Opinion of the Justices of the Supreme Court to the Governor.

In the matter of Time within which to exercise the Veto Power.

MAY 26, 1922.

(1) Constitutional Law. Amendments.

In proposing and approving articles of amendment to the constitution the general assembly is presumed to have had in mind certain rules of interpretation which in this State had been long established by judicial decisions when the article was proposed and submitted to the people, and the article should be construed in accordance with such rules.

(2) Time. Sundays.

The established rule in this State in computing a period of time within which an act is to be done, is that unless a different intention is expressly or clearly indicated Sundays are counted, except when the last day falls on Sunday.

(3) Time. Interpretation of Constitution.

In interpreting a provision of the constitution, no meaning other than the natural and ordinary meaning of the language used can be given it, unless

such construction would lead to an unjust or otherwise unreasonable result manifestly not intended.

(4) Constitutional Law. Time. Sundays.

Art. XV, Amend. Const. R. I. in part provides: "If the measure shall not be returned by the governor within six days (Sundays excepted) after it shall have been presented to him, the same shall become operative unless the general assembly, by adjournment, prevents its return, in which case it shall become operative unless transmitted by the governor to the Secretary of State, with his disapproval in writing, within ten days after such adjournment."—

Held, that in computing the period allowed the governor to return a measure with his disapproval thereof, Sundays should be included except a Sunday which happened to be the tenth day.

(5) Time. Sundays.

When the first day of a period is Sunday, that day should be included in the computation of time within which an act is to be done.

MAY 26, 1922.

To His Excellency Emery J. San Souci, Governor of the State of Rhode Island and Providence Plantations:

We have received Your Excellency's request for a written opinion upon the question involved in your communication of May 9, 1922, which is as follows:

"To the Honorable the Justices of the Supreme Court of the State of Rhode Island:—

I hereby respectfully request your opinion upon the following question of law:

The General Assembly, on the legislative day, April 21, 1922, passed House Bill No. H 823 Substitute 'A,' entitled,

'AN ACT To Secure More Adequate Economic Support and More Efficient Administration of Public Education, and Amending Chapters 40, 63, 64, 65, 66, 67, 68, 72, 73, 74 and 101 of the General Laws and Chapters 458 of the Public Laws of 1909, 947 of the Public Laws of 1913, 1201 of the Public Laws of 1915, 1492 of the Public Laws of 1917, and 1794 of the Public Laws of 1919, and All Amendments Thereof and in Addition Thereto.'

and on the same legislative day adjourned sine die.

This bill was presented to the Governor for his consideration on the same legislative day. On May 3, 1922, the Governor transmitted the bill to the Secretary of State with his disapproval in writing.

Article 15 of Amendment to the Constitution of the State in part provides:—

'If the measure shall not be returned by the governor within six days (Sundays excepted) after it shall have been presented to him, the same shall become operative unless the general assembly, by adjournment, prevents its return in which case it shall become operative unless transmitted by the governor to the Secretary of State, with his disapproval in writing, within ten days after such adjournment.'

Two Sundays occurred between the twenty-first day of April, 1922 and May 3, 1922, and the Governor returned the bill on said May third, understanding that Sundays were to be excepted from said ten day period. Question has arisen as to whether said two Sundays were to be excluded in computing said period of ten days after the adjournment of the General Assembly.

Therefore the question is: Was the said action of the Governor in vetoing said bill within the time specified effective, or did said bill become a law notwithstanding?

EMERY J. SAN SOUCI,

May 9, 1922. Governor of the State of Rhode Island."

We have also received your communication dated May 13, 1922, in which you state supplemental facts, as follows: (1) that although the records of the general assembly show that said general assembly adjourned on the legislative day of Friday, April 21, 1922, said records also show that said general assembly adjourned on the calendar day of Saturday, April 22, 1922; (2), "that the day after said April 22, the day after said actual adjournment, was Sunday," and request our opinion upon the following questions as incidental to the main question in your said request dated May 9, 1922:

- "(1) Is the day of the adjournment of the General Assembly, from which the period of 'ten days after such adjournment' is required by said constitutional veto provision to be computed, the legislative day of adjournment, or the calendar or natural day on which as a matter of fact the General Assembly actually adjourned?
- "(2) If the calendar or natural day on which as a matter of fact the General Assembly actually adjourned is held to be the day of adjournment of the General Assembly for the purpose of said constitutional provision, is Sunday, the next day after the day of said actual adjournment, to be computed in said period of ten days?"

Our answer to the question in your communication of May 9, 1922, is that the action of the Governor in vetoing said bill was not effective and that said bill became operative. We answer the second question contained in your supplemental communication in the affirmative. In view of the above answers we have deemed it unnecessary to consider the first question contained in your supplemental communication.

The questions involve the interpretation of the last sentence of Section 1 of Article XV of Amendments to the Constitution of this State. Said Article XV was adopted in November, 1909. As all amendments to our constitution are proposed by one general assembly and approved by the succeeding general assembly before being submitted to the people for adoption or rejection (See Const. R. I. Art. XIII), two general assemblies considered the language of said Article XV now under consideration. In proposing and approving said article containing said language said general (1) assemblies are presumed to have had in mind certain rules of interpretation which in this state had been long established by judicial decisions when said article was proposed, and submitted to the people. We think said article should be construed in accordance with said rules.

It is held in a few jurisdictions, when an intention is not otherwise expressed, that Sunday is excluded in computing

a period of time less than one week and it has been held in some states, by applying the rule of construction adopted in the particular jurisdiction, that the intention was to give (2) the governor as many working days to consider bills after the legislature adjourned as he had when it was in session and that it was necessary to exclude Sundays in order to effectuate that intention. No such question arises in the case under consideration and it was never the rule in this state to exclude Sundays in computing periods of time of less than one week. The rule which was early established and which has been consistently followed in this State is that unless a different intention is expressly or clearly indicated Sundays are counted in computing periods of time except when the last day falls on Sunday and we think this rule is consistent with the weight of authority. In Barnes v. Eddy, 12 R. I. 25, this court, at page 26, said: "The cases on this point are not entirely harmonious, but we think the better rule is that which is laid down In the matter of Goswiler's Estate. 3 Pa. 200. The rule is this: 'Whenever by a rule of court or an act of the legislature a given number of days are allowed to do an act, or it is said an act may be done within a given number of days, the day in which the rule is taken or the decision made is excluded, and if one or more Sundays occur within the time they are counted unless the last day falls on Sunday, in which case the act may be done on the next day." See also Franklin v. Holden, 7 R. I. 215; Casey v. Viall, 17 R. I. 348; West v. West, 20 R. I. 464; Beebe v. Greene, 34 R. I. 171. If we apply the above rule it is clear that had the words "Sundays excepted" not been inserted the words "six days" would mean six calendar days and Sunday would not be excluded except when the last day fell on Sunday and the words "ten days" would mean ten calendar days Sundays included, excepting Sunday which happened to be the tenth day. The natural meaning of the sentence which we are asked to construe is the same as it would be had the words "(Sundays included except a Sunday which happens to be the tenth day)" been inserted

(3) immediately after the words "within ten days." In interpreting a provision of the constitution we are not at liberty to give the language of that instrument any meaning other than the natural and ordinary meaning of the language used unless such construction would lead to an unjust or otherwise unreasonable result manifestly not intended.

Section 19 of Chapter 32, G. L. 1909, which was in force and had been for many years when said Article XV of the Amendments was proposed, is as follows: "Sec. 19. Every statute which does not expressly prescribe the time when it shall go into operation, shall take effect on the tenth day next after the rising of the general assembly at the session thereof at which the same shall be passed." The general assembly which proposed and the succeeding general assembly which approved said article are each presumed to have had knowledge of said section and to have knowledge of said section and to have known that in

(4) had knowledge of said section and to have known that in counting the days after adjournment, to ascertain when an act became operative, Sundays were included. The existence of the ten days' period in said article can undoubtedly be traced to this statutory provision.

Had it been the intention of the general assemblies which acted upon said article, and the people who adopted it, that Sundays (other than a Sunday which happened to be the last day of the ten days' period) should be excluded in computing the time within which the Governor may veto a bill after the adjournment of the general assembly, we think, in view of the well-known rule of construction applied in this State, the words "Sundays excepted" would have been inserted after the words "within ten days."

It was argued that inasmuch as the six days' period could embrace but one Sunday the use of the word "Sundays" instead of "Sunday" indicates an intention to apply the exception also to the ten days' period which might include more than one Sunday. The phrase "Sundays excepted" is commonly used to denote the singular as well as the plural. Section 3 of Chapter 32, G. L. 1909, entitled, "Of the Construction of Statutes," was in force and had been

for many years when said Article XV was proposed and adopted. Said section contains a provision, as follows: "every word importing the plural number only, may be construed to extend to and to embrace the singular number also."

It was contended in the argument before us that while the journal of the house and of the senate each shows that the general assembly adjourned on the legislative day of Friday, April 21, 1922, said journals also show that said general assembly adjourned on the calendar day of Saturday, April 22, 1922. It was also contended that a Sunday which commences a period of time should be excluded as well as a Sunday which ends the period and that, as Sunday, April 23, was the first day which followed the actual day of adjournment of the general assembly, said Sunday should be excluded from the time within which the Governor may act.

When the first day of a period is Sunday, that day should (5) be included in the computation and the general rule is applicable that "when a given number of days are allowed to do an act, or when an act may be done within a given number of days, the Sundays within the time are counted unless the last day falls on Sunday, in which case the act may be done on the next day,"—West v. West, 20 R. I. 464; see also Franklin v. Holden, 7 R. I. 215; Barnes v. Eddy, 12 R. I. 25; Casey v. Viall, 17 R. I. 348. The rule that intervening Sundays are to be counted prevails in most jurisdictions when applied to periods of time exceeding one week. 26 R. C. L. 751, § 26.

In view of the foregoing conclusions it is immaterial in the present case whether the general assembly adjourned on Friday, April 21, 1922, or on Saturday, April 22, 1922.

WILLIAM H. SWEETLAND, WALTER B. VINCENT, CHARLES F. STEARNS, ELMER J. RATHBUN, JOHN W. SWEENEY.

FREDERICK A. STEVENS vs. THE SUPERIOR COURT.

MAY 26, 1922.

PRESENT: Sweetland, C. J., Vincent, Stearns, Rathbun, and Sweeney, JJ.

- (1) Divorce. Discontinuance of Petition. Allowance to Wife. Counsel Fees.

 When a wife who is a respondent in a divorce proceeding files an application for an allowance to enable her to defend against the husband's petition or for her support pendente lite, the right accrues to her under the statute to have a determination upon her application and the husband will not be permitted to defeat that right by a discontinuance. If a notice of discontinuance is filed after the wife's application for an allowance has been heard and determined in her favor but before a decree has been entered the court should enter a decree as of the date of its determination for such amount as it shall deem proper in the circumstances and the petition should not be discontinued until the rights of the wife are protected.
- (2) Divorce. Allowance to Wife. Counsel Fees.
- It would seem that under the statutory provision for an allowance to the wife in the divorce proceeding to enable her to defend against a petition that counsel fees in connection with the filing and prosecution of the wife's petition for an allowance might be allowed.
- (3) Prohibition. When Writ Issues.

The court will not by the extraordinary and discretionary writ of prohibition restrain a justice of a lower court from the determination of a matter within his general jurisdiction because the petitioner fears that the action of such court may be adverse to him or erroneous, and even where the jurisdiction of the inferior tribunal is questionable or plainly lacking the court will assume that such tribunal will pass correctly upon the question of its own jurisdiction, but the court will leave the parties to their ordinary methods of review, unless it appears upon the face of the record that the inferior tribunal is without jurisdiction and that if it should assume jurisdiction a decision therein might work irreparable injury.

PROHIBITION. Heard on petition for writ and denied.

SWEETLAND, C. J. This is a petition for writ of prohibition which shall restrain the Superior Court from taking further action in a petition for divorce except to enter a discontinuance of same.

It appears that on February 13, 1922, Frederick A. Stevens filed his petition for divorce from Claire F. Stevens which petition is now pending in the Superior Court. On March 27, 1922, upon the application of said Claire

F. Stevens, Mr. Justice Capotosto in his rescript made an allowance out of the estate of this petitioner for the support of said Claire F. Stevens and the three minor children of petitioner and respondent pendente lite, and also an allowance out of his estate for counsel fees to enable her to defend against said petition for divorce. On March 28, 1922, this petitioner filed in the office of the clerk of the Superior Court a notice of discontinuance of his petition for divorce and served copies of said notice of discontinuance upon the attorneys of record of said Claire F. Stevens. On April 1, 1922, that being the first motion day in the Superior Court after the filing of the notice of discontinuance, said notice came before Mr. Justice Capotosto and the matter of the discontinuance of said petition for divorce was partly heard and was continued to April 8th, 1922, for further hearing. Thereupon the petitioner commenced the proceeding now before us.

At the hearing in this court, counsel for the petitioner cited in support of his petition for the writ of prohibition a number of cases from other jurisdictions which he regarded as authorities for the doctrine that a complainant in equity is entitled as a matter of course to discontinue his suit at any time before the entry of an interlocutory or final decree therein. These opinions however are not pertinent here as the right of the moving party at law or in equity to discontinue his action or suit is regulated by statute. Section 27, Chapter 283, General Laws, 1909, is as follows: "Sec. 27. The plaintiff in any civil action, suit, or proceeding at law or in equity, in which process has been returned to any court, may at any time before the trial or hearing thereof be begun file in the office of the clerk of such court, a written notice of discontinuance signed by himself or his attorney, and stating therein the action, suit, or proceeding to be discontinued and the time of filing such notice; and if the action, suit, or proceeding shall have been answered, a copy of such notice shall be given immediately to the defendant or his attorney of record by the plaintiff;

and thereupon said court, on its next motion day, or the next civil session of the district court, shall enter such discontinuance, as of course, and as of the day of filing such discontinuance, unless it shall appear that the rights of some other party thereto, or interested therein, will be impaired by such discontinuance; and no costs accruing after such discontinuance by the court shall be taxable for the defendant."

By virtue of this section, on the next motion day in the Superior Court after the petitioner had filed his notice of discontinuance, there was presented to said justice the judicial question as to whether the rights of the petitioner's wife would be impaired by such discontinuance. This question has been heard in part by said justice and is now pending before him.

The petitioner claims that the Superior Court was without jurisdiction to act otherwise than to enter said discontinuance, because it is contrary to public policy for that court to force a petitioner for divorce to proceed against his will, upon his petition to a decision and final decree which may divorce him from the bond of marriage. We have no reason to assume that the Superior Court is about to take the action which this claim of the petitioner suggests. From what has been made to appear here said justice has under consideration and has continued for further hearing the question of whether the petitioner's wife has rights under her application for an allowance, and the determination of said justice made thereon, which will be impaired by the entry of a discontinuance, and if she has rights the further question as to the conditions which, in justice to the parties, should be imposed upon the entry of discontinuance.

The petitioner further claims that the Superior Court is without jurisdiction for the reason that at the time the petitioner filed said notice of discontinuance that court had not entered a formal decree in favor of the petitioner's wife for the allowance which said justice made in his rescript. In this position the petitioner would have us take too narrow

a view of the effect of the respondent's application under the statute for an allowance out of the estate of her husband. When one spouse brings the other into court upon a petition for divorce certain rights arise to the respondent. sections 13 and 14, Chapter 289, General Laws, 1909, the respondent may by motion avail himself of any matter which would be open to him upon a cross petition and upon such motion the court may grant affirmative relief to the respondent. This court has held that if a respondent proceeds to avail himself of the benefit of this statutory provision the petitioner will not be permitted to deprive the respondent of such benefit by discontinuance of the petition. Borda v. Borda, 43 R. I. 384. This benefit is secured to a respondent not by force of a decree entered in the cause, but because of the statutory provision in his favor. If the respondent in divorce be a wife, the statute prescribes that in the discretion of the court an allowance may be made in her favor out of the estate of her husband for the purpose of enabling her to defend against the husband's petition for divorce, provided she has no property of her own available for that purpose; and under the statutory provision giving to the court, which has original jurisdiction in divorce, the power to make such interlocutory decrees as may be necessary (Chapter 247, Section 16, Gen. Laws, 1909), the practice has become established of entertaining the application of a wife, whether a petitioner or a respondent, for an allowance from the estate of her husband for her support pendente lite. Sanford v. Sanford, 2 R. I. 64. When a wife, who is a respondent, files an application for either of (1) such allowances, the right accrues to her under the statute to have a determination upon her application, and the husband will not be permitted to defeat that right by a discontinuance, just as he can not defeat her right to have a determination upon a motion filed by her in the nature of a cross petition. If a decree for an allowance has been entered, then upon the filing of a notice of discontinuance such interlocutory decree should be modified if justice requires its

modification to meet the changed conditions and the court should take such action as would prevent an impairment of the wife's right under the original or the modified decree. If, as in this case, a notice of discontinuance is filed after the wife's application for an allowance has been heard and determined in her favor, but before a decree has been entered, then the court should enter a decree as of the date of its determination for such amount as it shall deem proper in the circumstances; and the petition should not be discontinued until the rights of the wife are protected. If a wife has made application for an allowance in accordance with the statute, then a right has accrued to her, although upon such application there has been neither hearing, determination nor decree; which right should be safeguarded upon discontinuance.

In our opinion said justice was acting within his jurisdiction in considering what modification should be made in his allowance to the wife for counsel fees and expenses if the cause was not to proceed to a final hearing, and also how her rights under the allowances for support and counsel fees should be secured to her in case of a discontinuance. A similar view has been taken by the court in O'Neil v. O'Neil, 100 Iowa, 743, Waters v. Waters, 49 Mo. 385, Woodward v. Woodward, 84 Mo. App. 328.

It appears to be the claim of the petitioner that if there is

a discontinuance there should be no allowance for counsel fees. It has been held by some courts that an allowance to (2) the wife for the purpose of enabling her to prosecute or defend against a petition for divorce looks entirely to the future and will not be granted for the purpose of paying the claims of counsel for services already performed. There appears to us, however, to be much force in the contrary opinion, and even when the court has held that generally there should be no allowance for the purpose of paying for services already rendered, an exception has been made in favor of services in connection with the filing and prosecu-

tion of a wife's petition for an allowance. Anderson v. Steger, 173 Ill. 112.

There is a further fundamental reason, arising out of our established practice in this form of proceeding, which would require us to dismiss the petition. This court will not by the extraordinary and discretionary writ of prohibition restrain said justice from the determination of a matter within his general jurisdiction because the petitioner fears (3) that the action of the justice may be adverse to the petitioner or may be erroneous. In Haworth v. Sherman, 37 R. I. 249, this court said: "Generally when an inferior tribunal has jurisdiction of the subject-matter of a proceeding, this court will not upon an application for a writ of prohibition consider disputed questions, the determination of which has been committed by law to such inferior tribunal." Even where the jurisdiction of the inferior tribunal is questionable or plainly lacking we will assume that such tribunal will pass correctly upon the question of its own jurisdiction. This court will not prohibit the action of such tribunal but will leave the parties to their ordinary methods of review following a decision, unless it appears upon the face of the record that such inferior tribunal is without jurisdiction and it further appears that if such tribunal should assume jurisdiction a decision therein might work irreparable injury. This court has granted the writ in a number of cases restraining action upon application to take the poor debtor's oath, where the magistrate was clearly without jurisdiction, and a discharge of the debtor would result in an injury to the committing creditor which could not be corrected upon review.

Petition denied. The restraining order heretofore entered is vacated.

Waterman & Greenlaw, for petitioner.

Flynn & Mahoney, Fitzgerald & Higgins, for respondent.

ARTHUR B. HARRINGTON et al for an Opinion.

JUNE 6, 1922.

PRESENT: Sweetland, C. J., Vincent, Stearns, Rathbun, and Sweeney, JJ.

- (1) Auctioneers. Civil Officers.
- An auctioneer appointed by a town council under Gen. Laws, 1909, cap. 188, § 1, must be regarded as having the same status as one elected in town meeting under cap. 49. Sec. 1.
- (2) Auctioneers. Civil Officers.
- In this State an auctioneer is by legislative intention the holder of a civil office within the meaning of that term as used in Sec. 1, Art. IX of the constitution.
- (3) Auctioneers. Civil Officers.
- A town council cannot appoint as an auctioneer under Gen. Laws, 1909, cap. 188, § 1, a person who is residing in and claims a residence in the town but who is not a qualified elector for said office.

QUESTION stated for opinion of the court under Gen. Laws cap. 289 § 20.

SWEETLAND, C. J. The members of the town council of Warwick on one side and Jacob B. Gordon and Louis Gordon on the other have adversary interests in a question involving the construction of the statutory provisions relating to auctioneers. In this proceeding they have concurred in stating such question to the court and in requesting our opinion thereon in accordance with the provisions of Section 20 of Chapter 289, General Laws, 1909.

It appears that on April 11, 1922, said Jacob B. Gordon and Louis Gordon resided in said Warwick but were not qualified electors of said town; that on said day they were by said town council appointed auctioneers of the town of Warwick to hold their respective offices until the next annual election of town officers in said town. A doubt has now arisen in the minds of the members of said town council as to whether under the constitution and laws of this State said Jacob B. and Louis Gordon were eligible to be appointed auctioneers as aforesaid, and as to whether the action of the town council in thus electing them was legal and effective.

The question submitted to us by the parties is as follows:

"May the Town Council of any town appoint as an auctioneer to hold office until the next annual election of town
officers, a person who is residing in and claims a residence in
the town but who is not a qualified elector for said office?"

The essential matter is as to whether the status of an
auctioneer constitutes a civil office within the meaning of
(1) that term as it is used in Section 1, Article IX of the Constitution of Rhode Island. That section is as follows:

"Section 1. No person shall be eligible to any civil office
(except the office of school committee), unless he be a
qualified elector for such office."

Counsel for the Messrs. Gordon have urged that in the determination of the question before us we should look entirely to the nature of an auctioneer's functions; that the important consideration is that he is conducting a business for his own personal gain as an agent for private parties and not as an agent for the city or state. Counsel have called our attention to the status of auctioneers under the laws of other jurisdictions wherein it clearly appears that an auctioneer is not regarded as a public officer but merely as a person conducting a private business, for the prosecution of which a license is required, and counsel further urge that provisions of the Rhode Island statute which name auctioneers as public officers and treat them as such are entitled to little weight in view of what counsel claim is the private nature of their functions.

With us, from early Colonial times down to the present, sales at auction have been regarded as proper subjects for governmental regulation; and auctioneers with powers to make such sales in accordance with public regulation and having certain duties to perform with reference to the public revenue have been enumerated by the general assembly among the town officers to be chosen by the electors on their town election days. Our present statutory provision is contained in Section 1, Chapter 49, General Laws, 1909, the essential portions of which are as follows: "The

electors in each town shall annually, on their town election days, choose and elect as many town officers as by the laws of the state are or shall be required; that is to say, a moderator to preside in all the meetings of the town, and a town clerk, a town council to consist of not less than three nor more than seven members . . . one or more auctionand all such other officers as by law are required in such town and as each or any town shall have occasion for." An auctioneer is required to take the engagement prescribed for civil officers generally; Section 15, Chapter 49, Gen. Laws, 1909. It is provided in Section 2, Chapter 188, General Laws, 1909, as follows: auctioneer shall, within ten days after his election or appointment, give bond to the town treasurer, tioned faithfully to execute the duties of his office according to law." A penalty is prescribed against all persons who "assume or exercise the office of an auctioneer," without being legally chosen, unless they are within certain excepted classes; Section 22, Chapter 188, Gen. Laws, 1909. auctioneer is required to retain from the amount of his sales a certain duty upon property sold by him and pay such duty to the general treasurer for the benefit of the State and the town in which he is elected or appointed; Section 12 to 18, Chapter 188, Gen. Laws, 1909. It is provided by Section 1, Chapter 188, General Laws, 1909, as follows: "In addition to the auctioneers elected in town meeting, the town council of any town may from time to time appoint as many more for their town as they may deem expedient, to hold their (2) offices until the next annual election of town officers." auctioneer appointed by the town council under the above

Counsel for the Messrs. Gordon might fairly argue that some of the statutory provisions to which we have referred above are perfectly consistent with the view that auctioneers are not civil officers and that such provisions may be regarded merely as regulations imposed upon the conduct

section must be regarded as having the same status as an

auctioneer elected in town meeting.

of a private business. We think however that taking all the provisions together they unquestionably lead to the conclusion that the general assembly has always intended to place auctioneers in the category of civil officers. This was the state of the law for more than a century before the adoption of our present constitution and has so remained for eighty years since. We must conclude that with us by [3] legislative intention, an auctioneer is the holder of a civil office within the meaning of that term as used in Section 1, Article IX of the Constitution supra. We therefore answer the question submitted in the negative.

Harold R. Curtis, Town Solicitor, for Town Council.
Curtis, Matteson, Boss & Letts, for Jacob and Louis Gordon.

EVELYN OKEN vs. ISIDORE J. OKEN.

JUNE 14, 1922.

PRESENT: Sweetland, C. J., Vincent, Stearns, Rathbun, and Sweeney, JJ.

(1) Husband and Wife. Action by Wife Against Husband for Negligence.

A wife cannot maintain an action of trespass on the case against her husband to recover damages from him on account of injuries sustained by her by reason of his negligence when she was living with him at the time she was injured and at the time of the commencement of the action.

TRESPASS ON THE CASE for negligence. Heard on exception of plaintiff and overruled.

Sweeney, J. This is an action of trespass on the case for negligence wherein the plaintiff seeks to recover damages for personal injuries. The plaintiff alleges that the defendant so negligently operated his automobile that it ran into her and caused her severe, permanent injuries. The defendant filed a plea in bar alleging that plaintiff is his wife and that he was living with her at the time of the accident and at the time of the filing of the plea. The plaintiff demurred to this plea and the demurrer was overruled by the Superior Court. The plaintiff thereupon claimed an exception to

this action of the Superior Court and has duly brought the case to this court upon her bill of exceptions.

The sole question raised by the exception is, Can a wife maintain an action of trespass on the case for negligence against her husband to recover damages from him on account of injuries sustained by her by reason of his negligence when she was living with him at the time she was injured and at the time of the commencement of the action?

It is admitted by the plaintiff that under the common law the wife could not maintain such an action against her husband. Has such a right of action been given to her by the statute law of this State?

The property rights and liabilities of married women have been enlarged from time to time by the General Assembly of this State until, at the present time, the property of any woman, whether acquired before or after marriage or which may be acquired by her own industry, shall be and remain her sole and separate property free from any control of her husband. Section 1, Chapter 246, General Laws, 1909. Formerly it was required that in all actions relating to the property of any married woman the husband and wife must jointly sue and be sued; Section 12, Chapter 166, Public Statutes, 1882. This section was amended in the revision of the General Laws, 1896, Chapter 194, Section 16, so as to read as at present, namely: "In all actions, suits and proceedings, whether at law or in equity, by or against a married woman, she shall sue and be sued alone." In the case of Gorman v. McHale, 24 R. I. 257, this court said the practical effect of the amendment was simply to do away with the former provision of the statute which required a married woman to join with her husband in actions relating to the property secured to her under the statute.

The attorneys for the plaintiff have cited several cases from other states in which the wife has been permitted to maintain an action against her husband for a violent assault upon her; but no case has been cited where the wife has maintained an action against her husband for personal

injuries caused by his negligence. The cases for the plaintiff have been decided in accordance with the statute law of the state in which the case arose but the great weight of authority is against her contention.

The court has carefully considered the statute law of this state relating to the property rights of married women and finds therein no authority, express or implied, authorizing a married woman to sue her husband for damages for personal injuries caused by his negligence. If such a radical change is to be made in the common law rights and liabilities of married persons, as that urged by the plaintiff, it must be made by clear enactment of the General Assembly, and not by this court in giving an unwarranted construction to the meaning of the statute law relating to the property rights of married women.

The plaintiff's exception is overruled and the case is remitted to the Superior Court for further proceedings.

Cooney & Cooney, for plaintiff.

Edward G. Fletcher, Greenough, Easton & Cross, for defendant.

JENNIE F. CONGDON vs. LOUIS H. BLOCK.

JUNE 14, 1922.

PRESENT: Sweetland, C. J., Vincent, Stearns, Rathbun, and Sweeney, JJ.

(1) Bills of Exception. Direction of Verdict.

When a party has excepted to the denial of his motion for the direction of a verdict and after verdict against him the court has granted his motion for new trial, the appellate court will not consider his exception to the refusal of the lower court to direct a verdict in his favor. This settled rule of practice however is applicable only in cases presenting similar circumstances to the ruling case. Following Barstow v. Turner, 29 R. I. 100, and Malafronte v. Milone, 33 R. I. 460.

TRESPASS ON THE CASE for negligence. Heard on exception of plaintiff and overruled.

SWEETLAND, C. J. This is an action of trespass on the case to recover damages for personal injuries which the

plaintiff alleges she received as a result of the negligence of the defendant.

The case was tried in the Superior Court before Mr. Justice Blodgett sitting with a jury and resulted in a verdict for the plaintiff. The defendant duly filed a motion for new trial which was granted by said justice. The cause is before us upon the plaintiff's exception to the decision of said justice granting the defendant's motion for new trial. The defendant has also brought a bill of exceptions to this court in which bill the defendant states his exception to the ruling of said justice denying the defendant's motion to direct a verdict in his favor at the close of the evidence.

The injuries of which the plaintiff complained were received by her when she was struck and knocked down by the defendant's automobile, operated by him, on Elmwood avenue in Providence. Said justice in his decision upon the defendant's motion for new trial reviews the testimony at length and concludes that the preponderance of the evidence is against the plaintiff's position that she was in the exercise of due care at the time of the accident. After an examination of all the evidence we are of the opinion that said justice was warranted in his conclusion and that the plaintiff's exception should be overruled.

As to the defendant's exception, we must apply the rule

laid down by this court in Barstow v. Turner, 29 R. I. 100, as the same has been interpreted in Malafronte v. Milone, 33 R. I. 460, i. e., that when a party has excepted to the denial of his motion for the direction of a verdict and after (1) verdict against him the court has granted his motion for new trial, then, since he has obtained the new trial which he sought, this court will not hear him upon his exception to the refusal of the Superior Court to direct a verdict in his favor. This rule is directly applicable to the situation of the defendant. Although Barstow v. Turner may be reregarded as reasonably the subject of criticism in some respects, it does set out what has become a settled rule of practice, which is logical and reasonable in some of its

aspects, and the present members of the court do not feel justified in overruling it. We have said, however, in *Malafronte* v. *Milone*, supra, that it is applicable only in cases which present similar circumstances. We will say in passing that our examination of the evidence convinces us that in this case the defendant has not been prejudiced by the application of the rule.

The exception of the plaintiff is overruled and the case is remitted to the Superior Court for a new trial.

Waterman & Greenlaw, Ralph M. Greenlaw, Charles E. Tilley, for plaintiff.

Philip C. Joslin, Cooney & Cooney, for defendant.

Rose Berger vs. Samuel Berger.

JUNE 14, 1922.

PRESENT: Sweetland, C. J., Vincent, Stearns, Rathbun, and Sweeney, JJ.

- (1) Divorce, Vacating Final Decree,
- A petition to vacate a final decree in divorce is an independent petition and in effect is a new and original proceeding. Objection to the action of the Superior Court thereon is properly raised by a bill of exceptions.
- (2) Divorce. Vacating Final Decree.
- Where a respondent has been guilty of fraud on the court and on the petitioner in having a final decree entered in divorce, and petitioner has taken prompt action to have it set aside and the rights of innocent third parties are not concerned, the right of the Superior Court to vacate the decree is clear.
- (3) Divorce, Final Decree.
- The resumption of marital relations by the parties after a decision in a divorce petition and before entry of final decree, is a condonation of the offence of the husband and the court could not enter final decree thereafter even by consent of the parties.

PETITION to vacate final decree. Heard on exceptions of respondent and overruled.

Stearns, J. The proceeding is by petition brought by Rose Berger to vacate a final decree in divorce which was entered in the Superior Court February 5, 1921. After a hearing, the petition was granted by a justice of the Superior Court on the ground that the respondent was guilty of fraud in causing the final decree to be entered. To this decision the respondent duly excepted and the cause is before this court on respondent's bill of exceptions.

The petition for divorce was filed by the petitioner, Rose Berger, in the Superior Court November 26, 1918. grounds alleged therein were extreme cruelty and neglect to provide. On September 5, 1919, after a hearing, decision was given for the petitioner. On September 27, petitioner was permitted to amend the petition for divorce by adding thereto a prayer that she be awarded the custody of a minor child and on the same day the custody of said child was awarded to the petitioner. In the summer of 1920, petitioner and respondent became reconciled. They secured a dwelling house in Providence and there lived together as man and wife until February 11, 1921, when the respondent abandoned petitioner. On February 5th, six days before he left petitioner, the respondent went to the office of an attorney who had first represented the petitioner in the divorce proceedings and told the attorney that he was going away and that he wanted a copy of the final decree in the divorce proceedings. The attorney told him to go to the office of the clerk of the Superior Court and there secure a copy of the decree. Respondent thereupon left the attorney's office and in a short time returned, and informed the attorney that a final decree had never been entered and that the petitioner Rose Berger desired to have a final decree entered. At some stage in the divorce proceedings, Mrs. Berger had secured another attorney to conduct her cause and, at the request of respondent, the attorney first mentioned telephoned to the attorney who had last represented Mrs. Berger and this attorney upon being informed of the alleged request of the petitioner, thereupon on the same day, February 5th, procured the entry of the final decree in divorce. This attorney testified that the petitioner had requested him to have the final decree entered some time after the decision was made but before the six months had elapsed when final decree was in order for entry (Sec. 19, Chap. 247, Gen. Laws), and that he had the decree entered, as he supposed at the time, in accordance with petitioner's wish. In fact however, the decree was entered without petitioner's knowledge or consent.

It further appears that before petitioner went to live with her husband again, she was assured by him that the divorce proceedings were to be stopped and that there would be no divorce. Upon discovering the facts petitioner on April 2, 1921, began proceedings to vacate the decree.

The petition to vacate a final decree in divorce is an independent petition and in effect is a new and original (1) proceeding. The objection to the decision of the Superior Court thereon is properly raised in this court by a bill of exceptions. Johnston v. Johnston, 37 R. I. 362.

The final decree in this case was procured by the fraud of

the respondent practiced on the court and on the petitioner. The petitioner has acted promptly and without delay and the rights of an innocent third party are not involved. Such being the case the right of the Superior Court to vacate the decree is clear. State v. Watson, 20 R. I. 354; Sampson v. Sampson, 223 Mass. 451. The principle involved is so well settled as to make other citation of authority unnecessary. The argument is made that petitioner is not acting from good (2) motives and that as she has obtained all that she asked for in her divorce proceedings she should not now be permitted to change her mind. There is no evidence in regard to the motives of the petitioner. But if petitioner had desired and authorized her attorney to secure entry of the final decree the court could not properly have entered it, as the resumption of marital relations with her husband after the decision and before entry of final decree was a condonation One of the reasons for the of the offence of the husband. delay required by the statute in the entry of a final decree is to give the parties an opportunity for reconciliation. a reconciliation had been effected in this case, it would be a fraud upon the court for either party to procure the entry of final decree. The State has an interest in the maintenance of the family relation and the law should and does require good faith in the parties and just cause to warrant the granting of divorce. The respondent was guilty of gross and contemptible fraud. To sustain his contention would be to make the court an instrument in effecting his fraud. The vital consideration is the fraud upon the court. The motive of petitioner in exposing the fraud is not material.

The exception of the respondent is overruled, and the case is remanded to the Superior Court for further proceedings.

Lee & McCanna, George J. Sheehan, James A. Lee, for petitioner.

Robinson & Robinson, David C. Adelman, for respondent.

MARY J. ARNOLD vs. MARGARET M. BARRINGTON.

JUNE 20, 1922.

PRESENT: Sweetland, C. J., Vincent, Stearns, Rathbun, and Sweeney, JJ.

(1) Hearsay Evidence. Secondary Evidence.

Where the records of the State Board of Public Roads relative to registration of automobiles had been destroyed, it was error to permit witness to testify that he found out by conversation with a clerk of the Board that an automobile was registered in the name of deceased and that the license expired at a certain time.

(2) Gifts. Bills of Sale.

Where a chattel was purchased in the first instance by a husband as a gift for his wife, no bill of sale or special act of delivery was necessary to give title to the donee.

TROVER AND CONVERSION. Heard on exceptions of defendant and sustained

VINCENT, J. This is an action of trover and conversion brought by Mary J. Arnold, a person interested in the estate of Edmund H. Matteson, late of Warren, deceased, against

Margaret M. Barrington alleging the conversion by the defendant of a Franklin automobile.

The plaintiff is a sister of Edmund H. Matteson and the defendant was his widow. The latter has remarried and is now Margaret Matteson Barrington.

Edmund H. Matteson died May 28, 1917, leaving a will in which the Industrial Trust Company was named as executor and said company later accepted the trust.

Mr. Edwin A. Cady, the manager of the Warren Branch of the Industrial Trust Company, made an investigation as to the ownership of the automobile when an inventory of the estate of the deceased was being prepared and, as a result thereof, the trust company decided that it would not be justified in claiming it as a part of the decedent's estate.

The plaintiff, proceeding in accordance with the provisions of Chapter 707 of the Public Laws of 1911, requested the executor in writing to commence an action to recover the automobile. The executor refused to do so, assigning as its reason, "that the evidence of ownership, in the possession of the executor, is not sufficient to warrant the belief that the action would be successful, or that the expense thereof would be a judicious expenditure of the funds of the estate." Thereafterwards the plaintiff, acting under the authority conferred by the statute, brought the present action. It was brought originally in the name of Mary J. Arnold but the writ was subsequently amended, on motion, so as to comply with the terms of the statute requiring the suit to be brought in the name of the estate.

The defendant sold the automobile about four months after the death of her husband.

The only question for consideration is whether the automobile belonged to the defendant or was the property of her husband at the time of his death.

The case was tried in the Superior Court before a justice thereof sitting with a jury and a verdict was rendered for the plaintiff for \$1120.

The case is now before us upon the defendant's exceptions.

These exceptions raise two questions: (1) Did the trial court err in refusing to strike out the testimony of William E. Reddy, a witness called on behalf of the plaintiff; and (2) did the trial court err in denying the motion of the defendant for a new trial?

The plaintiff, in order to show that Edmund H. Matteson and not his wife owned the car, called as a witness the deputy chief clerk of the State Board of Public Roads who testified that the records of that board, so far as they relate to the registration of automobiles for the years 1915 and 1916 had been destroyed in accordance with law. He further testified that in order to register an automobile in 1915 and 1916 the applicant had to make oath to the fact recited in the application blank and that the printed application blanks furnished by the board during those years contained the words, "I, the undersigned, the owner of the motor vehicle herein described, hereby apply to the State Board of Public Roads for the registration of said machine."

Following this, William E. Reddy, an attorney at law, was called and testified that he went to the automobile (1) department of the State Board of Public Roads on November 15, 1917, and there found out "that a Franklin machine, 1914, Rhode Island number 6298, was registered in the name of Edmund H. Matteson of Warren, R. I., manufacturer's number was 21562, and the license expired September, 1917," and that he found no change from the name of Edmund H. Matteson.

It was developed however on cross-examination that Mr. Reddy's only source of information was a conversation with some clerk in the office of the State Board of Public Roads. The trial court permitted this testimony to stand as a part of the record, saying, "It is hearsay testimony but it is the the best they had, and I will allow it."

We think that this testimony should have been stricken out. The witness was simply repeating something which he says was told him by a clerk in the office of the State Board of Public Roads. He does not pretend that he

obtained the information from any personal examination of records or otherwise than as before stated. There is substantial authority to the effect that hearsay is not admissible as secondary evidence. 22 C. J. 1070.

As the defendant argues, this testimony taken in connection with that of the deputy clerk of the board would be likely to lead the jury to believe that Edmund H. Matteson had made oath that he owned the car.

The plaintiff introduced testimony to show that the automobile was paid for by the husband, Edmund H. Matteson; that it was registered in his name; that he paid the taxes upon it; that he sometimes spoke of it as his car; that he paid for repairs and other expenses; that he drove the car; that no bill of sale was given by the husband to the wife; and that the car was kept in a garage belonging to the husband. These facts are admitted by the defendant with the exception of the statement of Luella Matteson wife of a brother of Edmund H. Matteson, that the latter always spoke of the car as his.

There is substantial testimony that Edmund H. Matteson on many occasions, and to several people, referred to the [2] car as belonging to his wife and that it was purchased by him, in the first instance, as a present to her. If that were so no bill of sale or special act of delivery was necessary to give title to the defendant.

The testimony as to the defendant's ownership of the car is somewhat strengthened by the undisputed fact that a "Rambler" car belonging to the defendant was turned in in part payment for the new car, the husband paying the balance in cash.

It is by no means uncommon for a husband in speaking of a house, an automobile, and many other things, to call them his although the legal title may be in his wife. The expenditures of the husband for repairs and taxes, his driving the car and keeping it in his garage, do not impress us as being anything more than what a husband, living in amicable relations with his wife, would naturally do. Such

acts are not in our opinion conclusive in determining the matter of ownership in the present case.

The trial justice in his rescript denying the defendant's motion for a new trial cites from 20 Cyc. 1195, as follows: "A mere promise or declaration of an intention to give, however clear and positive, is not enough to constitute a valid gift inter vivos. The intention must be consummated and carried into effect by those acts which the law requires to divest the donor and invest the donee with the right of property. Complete and unconditional delivery is essential to the perfecting of such a gift, for where the donor retains dominion over the property or where a locus penitentia remains to him there can be no legal and perfect donation."

There can be no question that the law relating to gifts inter vivos is correctly stated. The error of the trial court is in its application to the case at bar. The trial justice seems to have proceeded upon the theory that Edmund H. Matteson originally owned the car and therefore, there being no sufficient evidence of a subsequent transfer or delivery to the defendant, it remained a part of his estate. There is testimony tending to show that Mr. Matteson never owned the car and that he paid for it not for himself but as a present for his wife. If the title was in her from the beginning, any transfer or act constituting a special delivery to her would have been superfluous.

We think that justice requires that the case should be submitted to another jury under proper instructions in accordance with this opinion.

The exceptions of the defendant are sustained. The case is remitted to the Superior Court with direction to give the defendant a new trial.

William H. McSoley, for plaintiff.

James Harris, John C. Knowles, for defendant.

ROGER LAUDATI vs. VINCENZO STEA et al.

JUNE 20, 1922.

PRESENT: Sweetland, C. J., Vincent, Stearns, Rathbun, and Sweeney, JJ.

(1) Libel. Question for Jury.

In an action for libel it was error to leave to the jury to decide whether a circular was libelous under instructions that the meaning of the word "steal" in the circular was to be determined by a consideration of the whole document, from which it was for the jury to say whether or not it was a malicious attempt to charge a crime or whether it was simply the use of exuberant language to express a very volcanic state of feeling.

(2) Libel.

An accusation is libelous per se, which falsely charges an offence which although not a crime at common law, if proved may subject the party accused to a punishment not ignominious but bringing disgrace.

(3) Libel. Charge of Larceny. Compensatory Damages.

Accusing one of stealing is charging the crime of larceny or embezzlement which is libelous per se, and there is no occasion to allege or prove special damages but accused is entitled on proof of defendant's responsibility, to recover compensatory damages.

(4) Libel. Punitive Damages.

The award of punitive damages in libel and slander is discretionary with the jury, where allowable, and they are properly allowed when actual malice is shown or a recklessness equivalent to actual malice.

(5) Libel. Publication.

A defendant is liable for publication of a libel even if he gave out but one copy of a circular of which a large number were printed.

(6) Libel. Liability for Error.

Where a circular made a grave charge against plaintiff by name, defendant cannot escape liability on the ground that the naming of plaintiff was a mistake and another person was intended, for where the words were clear there was no need to refer to extrinsic evidence to determine to whom the writing was intended to apply and the mistake could easily have been discovered by defendant by reading the circular.

(7) Libel. Intent. Damages.

A defendant in libel is bound by the natural and ordinary consequences of his acts and his intent is no defence but is properly to be considered only in the assessment of damages.

Trespass on the Case for libel. Heard on exceptions of plaintiff and sustained.

STEARNS, J. The action is trespass on the case for libel. The plea is the general issue. After a jury trial, which resulted in a verdict for the defendant Stea, the case is now in this court on plaintiff's bill of exceptions.

The defendant Stea was the presiding officer of one of the subordinate lodges of the order of the Sons of Italy, a large fraternal organization of men of Italian descent. The plaintiff is a young man of good reputation, who is engaged in the real estate business in the Silver Lake District of Providence. Plaintiff was a member of the organization in 1917, but, at the time of the publication of the libel, in March, 1918, he was no longer connected with the society. Plaintiff's uncle, Nicola Laudati, was an officer of the society and also the president of a committee of the order which had control of the "Death Benefit" fund. Upon the death of one of the members of the order, a controversy arose as to whether the lodge, which had been paying the dues of the deceased, or the widow of deceased, was entitled to receive the amount of the death benefit. Nicola Laudati claimed the fund for the lodge. Antonio Sollito, an officer of one of the lodges, supported the claims of the widow. There is evidence that defendant and certain other members of the society prepared and had printed, in the Italian language, fifteen hundred circulars which later were widely circulated throughout the State among the Italians. language of the circular was violent and abusive. After announcing the fact that Sollito had been suspended by the organization because of his support of the claim of the widow, the charge was made in the circular that Sollito had thus been made the first victim by the grafters of the organization; that it was now known to all the members the efforts made by Sollito and others "against the company of secret advisers of Silver Lake led by R. Laudati and his sponsors, who wrongfully appropriated \$400, fleeced from all the Brothers of Rhode Island and stolen from a poor widow;" reference was also made to this bad administration by Laudati and his companions and to a demand

which had been made for the restitution of the money wrongfully appropriated. The printed circular purported to be signed by the defendant Stea and others. Stea denies that he signed the draft for the printed circular and also makes a general denial of any responsibility for the publication of the printed circulars. The evidence on these issues is conflicting and raised issues of fact for the jury. The originators of the circular secured the services of an Italian scholar to revise and embellish their work. He testifies that the printed circular was prepared by him according to instructions and the draft given to him. It seems probable that the name "R. Laudati" by some mischance was printed instead of that of "N. Laudati," as defendant did not know the plaintiff R. Laudati. The printed circulars were delivered by the printer to Sollito. From him defendant secured at least one of these copies, which he carried to Bristol, and there gave to a member of the organization, to whom he stated that the circular contained a statement of what had been going on in Providence. Plaintiff is the only "R. Laudati" who lives in the Silver Lake District, and, in fact, in the entire State.

Numerous objections taken by plaintiff during the trial are waived and the only exceptions now urged are those taken to the charge to the jury, to the failure to charge as requested, and to the refusal of the trial justice to grant a new trial.

The trial justice left it to the jury to decide whether the circular was libelous and instructed them that the meaning of the word "steal" in the circular was to be determined by consideration of the whole document, from which it was for the jury to say whether or not it was a malicious attempt to charge a crime or whether it was simply the use of exuberant language to express a very volcanic state of feeling. This instruction was erroneous, and plaintiff's exception thereto is sustained. An accusation is libelous per se which falsely charges an offence which, although not a crime at common law, if proved may subject the party

accused to a punishment not ignominious but bringing disgrace; Kelley v. Flaherty, 16 R. I. 234 (a charge of fornication); Morrissey v. Providence Telegram Co., 19 R. I.

- (2) 124 (a charge that a man is an "ex-convict"); Blake v. Smith, 19 R. I. 476 (a charge of the keeping of a house of ill fame). The charge in the circular is, the commission of the crime of larceny or embezzlement. This is libelous per se and consequently there was no occasion to allege or prove special damages. Upon proof of defendant's responsibility for the libel plaintiff is entitled to recover compensatory damages. State v. Spear, 13 R. I. 324; O'Brien
- (3) pensatory damages. State v. Spear, 13 R. I. 324; O'Brien v. Times Publishing Co., 21 R. I. 256. The award of exemplary or punitive damages in libel and slander is discretionary with the jury in cases where they are allowable. Kenyon v. Cameron, 17 R. I. 122. They are properly
- (4) allowed when actual malice is shown, Tillinghast v. Mac-Leod, 17 R. I. 208, or a recklessness equivalent to actual malice, Folwell v. Providence Journal Co., 19 R. I. 551.

The court further charged that to entitle plaintiff to recover he must prove that at the time this circular was drawn up, it was the intent of the maker of it to libel R. Laudati and that if the name "R. Laudati" was used instead of "N. Laudati" as a result of negligence plaintiff could not recover; that if defendant caused the publication of the circular and intended to libel R. Laudati the verdict should be for plaintiff, but if the circular was not aimed at R. Laudati and if from the whole of the circular it appears it could not have been a libel against R. Laudati because he was not a member of the organization and was not interested in the internal dissensions of the society and that if the whole context of the circular is such that it shows that it was aimed at that person who was an officer and who was interested in the death benefit, that it was aimed at him, then the verdict must be for the defendant. This part of the charge was erroneous. The question as stated in one (5) of the cases is not who was aimed at, but who was hit. By his own admission defendant was responsible for the pub-

lication of the libel even if, as he claimed, he gave but one copy of the circular to the member of the organization in Bristol. Rice v. Cottrell, 5 R. I. 340. If a mistake was made in the printing of the name, it could easily have been discovered by defendant by reading the circular. A grave charge designedly intended to injure the reputation of the person named in the circular was made. The circular [6] referred by name to one person only. No one else could have a cause of action for this libel. There was no need to refer to extrinsic evidence to determine to whom the writing was intended to apply. The meaning of the circular as conveyed by the words is clear. The fact that active members of the organization understood that a mistake had been made in the name used is no defence. The public had no means of ascertaining who was referred to except by what was stated in the circular. The defendant in libel, as in other torts, is bound by the natural and ordinary consequences of his acts. The intent of defendant is no defence to the action, but is properly to be considered only in the assessment of damages. Folwell v. Providence Journal Co., supra; Taylor v. Hearst, 107 Cal. 262; Corrigan v. Bobbs-Merrill Co., 228 N. Y. 58. In the circumstances proof of express malice was unnecessary. The element of legal malice is found in the negligence and recklessness of defendant's acts. Folwell v. Providence Journal Co., supra.

As the plaintiff is to have a new trial it is unnecessary to consider the other exceptions.

Plaintiff's exceptions to the charge of the court which we have considered are sustained and the case is remitted to the Superior Court for a new trial.

George F. Troy, for plaintiff.

William C. H. Brand, Joseph Veneziale, for defendant.

VITILINA HEWETT vs. CLARENCE N. HEWETT.

MAY 5, 1922.

PRESENT: Sweetland, C. J., Vincent, Stearns, and Rathbun, JJ.

- (1) Constitutional Law. Decrees. Full Faith and Credit.
- If a decree of the court of another State is final and conclusive and not subject to modification or annulment by the court entering the same it is entitled under Section 1, Article IV of the constitution of the United States to full faith and credit in the courts of this State.
- (2) Pleading. Debt on Judgment of a Foreign State.
- An action of debt on a decree of a court of another State does not state a case where it does not appear by the declaration that the decree is an enforceable judgment in the State where it was rendered.
- (3) Judicial Notice. Laws of Foreign State.
- Ordinarily the law of a foreign state is a fact that must be proved by evidence, but where a provision of the federal constitution is brought in question as to the effect of a judgment of a court of another state the court will take judicial notice of the laws of such state.
- (4) Judicial Notice. Full Faith and Credit. Constitutional Law.
- Where the court taking judicial notice of the statutes and decisions of the courts of another state finds that the courts of that state are not bound to enforce the terms of a decree for alimony and that the court entering the decree may in its discretion modify or annul the same, it follows that such decree is not entitled to the protection of the full faith and credit clause of the federal constitution.

ACTION OF DEBT. Heard on exception of plaintiff and overruled.

RATHBUN, J. This is an action of debt on a decree of the Probate Court for the county of Worcester, Mass. The case is before this court on the plaintiff's exception to the ruling of the Superior Court sustaining a demurrer to the declaration.

Said declaration alleges that on the 4th day of May, 1897, said Probate Court entered an order awarding the care and custody of Clarence A. Hewett, the minor child of said Clarence N. Hewett and Vitilina Hewett (husband and wife), to said Vitilina Hewett, prohibiting said Clarence N. Hewett from imposing any restraint on the personal liberty

of said Vitilina Hewett; and ordering said Clarence N. Hewett to pay to said Vitilina Hewett for her support and for the support of said minor child the sum of \$10.00 on the first day of June, 1897, and the further sum of \$10.00 on the first day of each and every month thereafter until the further order of said court. The declaration further alleges that said decree is in full force and not reversed, annulled, modified or satisfied in whole or in part and that the sum of \$2,810, together with legal interest thereon, is now due.

The demurrer to said declaration was upon the following grounds: (1) that plaintiff by virtue of said decree obtained no absolute or vested right to demand or receive the money ordered by said decree to be paid; (2) that the court which entered said decree may at any time in its discretion modify or revoke said decree; (3) that by the law of Massachusetts exclusive jurisdiction to enforce the decree in question is in the court which rendered said decree; (4) that by the law of Massachusetts said decree is revocable and is not enforceable until after the court entering said decree shall on hearing determine that said decree shall be enforced.

The plaintiff filed a motion in the Superior Court to strike out the above demurrer and to strike out each and every ground of demurrer for the reason that "each of the grounds of demurrer alleged is based upon the law of a state other than the State of Rhode Island and that the defendant has not pleaded what the law of said other state is." The Superior Court denied said motion and the plaintiff excepted but at the hearing before us this exception was waived.

If said decree is final and conclusive and not subject to modification or annulment by the court entering the same it is entitled, under Section 1, Article IV of the Constitution of the United States, to full faith and credit in the courts of this state. On the other hand, if the plaintiff has no absolute and vested right to demand and receive installments of alimony ordered by said decree to be paid, the decree is given no protection by said constitutional provision. Mr. Justice White in Sistare v. Sistare, 218 U. S. 1 at 16 and 17,

stated the rule as follows: "First, that, generally speaking, where a decree is rendered for alimony and is made payable in future installments the right to such installments becomes absolute and vested upon becoming due, and is therefore protected by the full faith and credit clause, provided no modification of the decree has been made prior to the maturity of the installments." "Second, That this general rule, however, does not obtain where by the law of the State in which a judgment for future alimony is rendered the right to demand and receive such future alimony is discretionary with the court which rendered the decree, to such an extent that no absolute or vested right attaches to receive the installments ordered by the decree to be paid, even although no application to annul or modify the decree in respect to alimony had been made prior to the installments becoming due."

We are of the opinion that the declaration does not in accordance with the ordinary rules of pleading state a cause of action for the reason that by the terms of the declaration it does not appear that the decree is an enforceable judgment in the state where it was rendered. The decree in question was entered in the course of a divorce proceeding between the parties. Said decree ordered alimony to be paid to the plaintiff in monthly installments. As we have before us no copy of said decree it is impossible without resorting to the Massachusetts law to ascertain whether said decree was for temporary or permanent alimony. A decree for temporary alimony is an interlocutory decree. Its enforcement is, in some jurisdictions, subject to the discretion of the court entering the decree. 14 Cyc. at 797.

It does not appear from the declaration that the court which entered the decree may not in its discretion by the modification or annulment of the decree take away the plaintiff's rights under said decree to receive the installments which by the terms of the decree have become due.

The case is before us on demurrer and unless we take judicial notice of the laws of Massachusetts we have no

information as to whether the plaintiff by virtue of the decree in question has a vested right to demand and receive 3) the installments which have become due. The Massachusetts court in a case similar to the one before us, Page v. Page, 189 Mass. 85 (which was an action upon a decree entered by a court of the State of Maine), apparently refused to take judicial notice of the law of the State of Maine by sustaining a demurrer to the bill on the ground that the bill contained no allegation that the decree was The court said: "This decision of the federal court" (Lynde v. Lynde, 181 U. S. 183) "is an authoritative declaration of the interpretation of the provision of the federal constitution under consideration," (the full faith and credit clause) "and is binding upon this court. order to bring herself under the protection of this provision the plaintiff therefore must show that the decree was final. The decree had reference simply to future payments, and generally such a decree in the form of this one is subject to modification by the court which passed it. There is no allegation in the bill upon that subject. It is true that there is an allegation that the decree 'still stands unreversed and in full force,' but that is not an allegation that it is final. It is not an allegation as to the nature of the decree, but simply that its nature has not been changed. As the question comes to us upon demurrer we have no information before us as to the law of Maine, but in view of the general character of such decrees and the general rule that they are subject to the revision of the respective courts which pass them, we cannot upon demurrer to this bill assume that the decree is final. If the plaintiff contends that it is, there should be in the bill some such allegation as there was in Brisbane v. Dobson, namely, that there is no authority in the court to reverse or modify the decree. So far, therefore, as the plaintiff relies upon this constitutional provision, she has not stated a case. So far as independently of that provision she asks the assistance of this court as in a case of foreign judgment, she is met by the same difficulty. It does

not appear that she has any positive or final decree for the payment of a sum certain or which can be made certain. The fair construction of the bill taken in connection with the nature of the decree is that she has no such final decree. For aught that appears the Maine court upon application might revise the decree and decline to issue any process for the collection of any sum whatever."

As the declaration fails to state the nature of the decree upon which the plaintiff seeks to recover, the question arises whether this court will examine the statutes of Massachusetts and the reported decisions of the court of last resort in the latter commonwealth in order to ascertain if possible whether said decree has in said commonwealth the force of an enforceable judgment. Ordinarily the law of a sister state is a fact which must be proved by evidence the same as any other fact, but state courts may when it is anticipated that a Federal question may arise as to the effect of a judgment of a court of another state take judicial notice of the law of such other state. 1 Chamberlayne on Evidence, Sec. 587; Wigmore on Evidence, Sec. 2573; Paine v. Schenectady Ins. Co., 11 R. I. 411.

The court below, following Paine v. Schenectady Ins. Co., supra, took judicial notice of the laws of Massachusetts and, as a provision of the Federal constitution is brought in question we will notice judicially the laws of the latter commonwealth.

Gen. Laws, 1909, cap. 292, § 49, provides that a copy of the statutes of any state purporting to be published by authority thereof and the published reports of decisions of the courts of any state shall be admitted in all the courts of this state as prima facie evidence of the laws of the state under whose authority they respectively purport to have been published. See Horton v. Reed, 13 R. I. 366; O'Donnell v. Johnson, 36 R. I. 308.

The parties agree that the Massachusetts court in entering the decree in question exercised jurisdiction conferred by a Massachusetts statute which is now Section 33 of Chapter 153 of the Revised Statutes of Massachusetts of 1902. Said section is as follows: "If a husband fails, without just cause, to provide suitable support for his wife, or deserts her. or if the wife, for justifiable cause, is actually living apart from her husband, the probate court may, upon her petition or, if she is insane, upon the petition of her guardian or next friend, prohibit the husband from imposing any restraint on her personal liberty during such time as the court shall by its order direct or until the further order of the court thereon; and, upon the application of the husband or wife or of her guardian, the court may make further orders relative to the support of the wife and the care, custody and maintenance of the minor children of the parties, may determine with which of their parents the children or any of them shall remain and may, from time to time, upon a similar application, revise and alter such order or make a new order or decree, as the circumstances of the parents or the benefit of the children may require."

In McIlroy v. McIlroy, 208 Mass. 458, a probate court exercising jurisdiction conferred by said section 33 entered a decree of divorce mensa et thoro. The decree ordered the husband to pay to the wife alimony in installments. husband did not comply with the order. Thereafter the parties having become reconciled lived together for a time as man and wife The parties again separated and the wife petitioned said probate court for an execution for the amount of the installments which by the terms of said decree had become due. Said court, after considering the circumstances, modified the decree and ordered that an execution issue for an amount less than the total installments due by the terms of the original order contained in the decree. Upon appeal the court of last resort of Massachusetts decided that the original order was not suspended by the act of the parties in becoming reconciled but was in full force during the time that the parties were living together as man and wife; that the probate court had full power to modify the decree and that the wife had no vested rights by

virtue of said decree. The court, at page 465, said: "Upon this petition, addressed to the court which made the original order, that court could consider any change in the present position of the parties and any facts that had occurred since the making of the first order, and if it found that justice so required, could order execution to issue for only a part of the unpaid arrears. Knapp v. Knapp, 134 Mass. 353, 357. It was doubtless upon this ground, and not, as the respondent has contended, upon any theory that the operation of the order had been suspended while the parties lived together, that the Probate Court based its conclusion as to the amount named in the order appealed from; and this as a matter of law was correct. And the Superior Court upon the appeal had the same power as the Probate Court."

In Knapp v. Knapp, 134 Mass. 353, the court, at page 355, said: "A decree for alimony, whether for alimony already due, or to become due in the future, is in a certain sense a debt of record established by a judgment." . . . "Such arrears, however, are not absolute debts, but the decree for alimony may be revised and altered from time to time, on petition of either of the parties." . . . peculiar nature of a decree for alimony, and the right and power in the court to revise or alter it at any time, execution is not necessarily to issue for the full amount of arrears of alimony found to have been due and unpaid at the time of the death of the defendant's testator; but it is in the discretion of the court, on the facts that may be proved, to determine for what sum, if for anything, the decree for alimony shall be enforced by an execution against his estate."

See also French v. French, 4 Mass. 587; Morton v. Morton, 4 Cush. 518; Newcomb v. Newcomb, 12 Gray, 28; Allen v. Allen, 100 Mass. 373; Slade v. Slade, 106 Mass. 499. We have shown that by the laws of Massachusetts the courts of that commonwealth are not bound to enforce the terms of the decree in question and that the court entering the decree may in its discretion modify or annul the same

and thereby take from the plaintiff all rights obtained under said decree. It is clear that the plaintiff by virtue of the decree upon which this suit is based has no vested right to demand and receive the instalments which by the terms of said decree are due. Consequently, by applying the rule, which we have quoted above, as laid down by Mr. Justice WHITE, in Sistare v. Sistare, supra, it follows that the decree in question is not entitled to the protection of the full faith and credit clause of the Federal constitution. The plaintiff relies upon Wagner v. Wagner, 26 R. I. 27, in which case the court held that the wife could recover in an action at law in this state alimony which by decree of the Superior Court of Massachusetts was ordered to be paid in installments. court used the following language: "The objection that an allowance is subject to alteration by the court ordering it, and so it cannot be regarded as a final and conclusive judgment, has little, if any, weight as to an amount already due at the time of suit. An accrued amount would not be changed by the court if the debtor was able to pay it, and a suit on a decree is but a step to enforce payment. But however this may be, the cases cited sufficiently recognize the right to sue; and in this case, the husband having died before this suit was brought, the possibility of a change had passed."

The Massachusetts decisions already cited clearly show that the court which entered the decree upon which this suit is brought would not hesitate, when justice required such action, to modify or annul the decree by changing the amount which had accrued even when the husband "was able to pay it," and even if the husband had deceased. From the opinion in Wagner v. Wagner, supra, it does not appear that the statutes of Massachusetts and the reported decisions of the court of last resort of that commonwealth were brought to the attention of the court. The statute by authority of which the decree then under consideration was rendered is not referred to and no decisions of the Massachusetts court are cited. What the law of Massachusetts

was when Wagner v. Wagner, was decided was a question of fact and we are not concerned with the question whether the court erred in its findings of fact relative to the finality, under the Massachusetts laws, of the decree then under consideration. We have made our finding as already set forth relative to such portions of the Massachusetts law as are material for the consideration of this case.

As the decree upon which this suit is based is interlocutory and conditional in Massachusetts it should not be considered as final and conclusive in Rhode Island.

The plaintiff's exception to the ruling of the Superior Court sustaining the demurrer to the declaration is overruled and the case is remitted to the Superior Court for further proceedings.

James H. Rickard, for plaintiff. Greene, Kennedy & Greene, for defendant.

ARTHUR H. BURNS, SR. et al. vs. WILLIAM BRIGHTMAN et al. MAY 19, 1922.

PRESENT: Sweetland, C. J., Vincent, Stearns, Rathbun, and Sweeney, JJ.

(1) Master and Servant. Presumption of Employment.

In a personal injury case, charge of the court that as defendants had admitted the automobile was theirs, if no other evidence was produced this was a prima facie case which would warrant the jury in drawing the conclusion that the person in charge of the machine was engaged in the employment of defendants, but as defendants had testified that the driver was not their servant and in their employ, this issue was to be decided upon consideration of all the testimony, was proper, as the presumption referred to by the court meant simply that plaintiffs had introduced sufficient evidence to require defendants to present their case, and this having been done the jury were to decide the issue upon all the facts in evidence.

(2) Negligence. Measure of Damages. Death by Wrongful Act.

In an action under Gen. Laws, cap. 283, § 14, to recover damages for the death of the intestate, charge that nothing could be given by way of solace for wounded feelings or for the bereavement suffered or for the pain and suffering of deceased or for the loss of the society of the wife and mother but that the measure of damages was the pecuniary loss sustained which

was the present value of the net result remaining after the personal expenses were deducted from the income or earnings of deceased and that to ascertain this it was necessary to ascertain first the gross amount of such prospective income or earnings and then to deduct therefrom what deceased would have expended as a producer to render the services or to acquire the money that she might be expected to produce, computing such expenses according to her station in life, her means and personal habits and then to reduce the net result so obtained to its present value, correctly stated the rule.

(3) Death by Wrongful Act. Damages.

Gen. Laws, cap. 283, § 14, of death by wrongful act covers the case of a married woman, not engaged in an income producing occupation, but whose time and energy were devoted to the maintenance of her household and the care of her husband and children, and the rule of damages is the same.

(4) Death by Wrongful Act. Construction.

As the action given by Gen. Laws, cap. 283, § 14, is statutory, its construction in regard to details not expressly provided for by the terms of the act, unless a contrary intent appears therein, should be in accord and in harmony with the other laws of the state.

(5) Death by Wrongful Act. Evidence.

In an action under the statute for death by wrongful act, evidence of standard life tables and tables showing the present value of a dollar for various terms of years were properly admitted.

(6) Death by Wrongful Act. Damages.

In an action for death by wrongful act, where deceased was not engaged in an income producing occupation but devoted her time to the maintenance of her household and the care of her husband and children, and there was evidence of the value of such services as deceased performed, according to the prevailing rate of wages, but no evidence of the expense deceased would have had to incur to produce her income, there was no sufficient evidence upon which real damages could be computed.

VINCENT, J., dissenting.

ACTION UNDER THE STATUTE for death by wrongful act. Heard on exceptions of defendants and sustained, on exception to refusal to grant a new trial.

STEARNS, J. This is an action brought under the statute (Gen. Laws, 1909, Chap. 283, § 14) by Arthur H. Burns and his children, to recover damages for the death of Julia Burns, the wife of Arthur H. Burns and mother of the children, which is alleged to have been caused by the negligence of a servant and agent of the defendants.

After a jury trial, which resulted in a verdict for plaintiffs for \$7,000, and a denial by the trial justice of defendants' motion for a new trial, the case is now in this court on the defendants' bill of exceptions.

Mrs. Burns, while crossing Thames street in Newport, was struck by an automobile which was driven by one John H. Killian and received injuries, which a few months later resulted in her death. It is admitted that the accident was caused by the negligence of Killian, but defendants deny that he was their servant and agent.

The defendants Brightman and Chase, who were partners, had the exclusive privilege of soliciting for the passenger business on Commercial Wharf in Newport. At the time of the accident Killian was driving an automobile which belonged to defendants and for which defendants held a license from the city of Newport to operate as a public On the morning of the day of the accident, vehicle. Killian went to the garage of defendants and later drove defendants' automobile to Commercial Wharf, where, upon the arrival of the steamer from Providence, he took certain passengers into the automobile and then started to drive through Thames street and there ran over Mrs. Burns. Neither Killian nor the other occupants of the car were witnesses at the trial, and it does not appear that any particular effort was made to secure their attendance. Defendants claim that the automobile was rented by Chase to Killian for the day for his own use and that the occupants of the car were his friends. Plaintiffs claim that Killian was the servant of defendants, engaged in carrying on their business and there was evidence of certain admissions to that effect made by defendants. The latter deny making any such admissions. This issue was one of fact and the jury found that Killian was the agent of defendants and was acting within the scope of his employment at the time of the accident. The trial justice has approved this finding, and the evidence is sufficient to support the finding.

Exception is taken by defendants to a part of the charge to the jury in which the trial justice stated in substance (1) that, as defendants had admitted the automobile was theirs, if no other evidence was produced this was a prima facie case which would warrant the jury in drawing the conclusion that the person in charge of the machine was engaged in the employment of defendants, but as the defendants had testified that Killian was not their servant and in their employ, this issue was to be decided upon consideration of all the testimony. The presumption referred to by the trial judge which made a prima facie case, meant simply that plaintiffs had introduced sufficient evidence to require defendants to present their case. This having been done, the jury was instructed to decide the issue upon all of the facts in evidence. There is no merit in this exception.

At the conclusion of the testimony defendants requested the court to direct a verdict for defendants on two grounds: 1, that there was no evidence that the driver of the automobile was the servant of defendants; 2, or, if he was their servant, that he was engaged in their business at the time of the accident. Defendants' exception to the refusal to direct a verdict is overruled. The evidence was conflicting on these issues of fact and the decision of these issues was properly left to the jury.

On the question of damages the court charged the jury that nothing could be given by way of solace for wounded 2) feelings, or for the bereavement suffered, or for the pain and suffering of the deceased or for the loss of the society of the wife and mother; that the measure of damages was the pecuniary loss sustained, which was the present value of the net result remaining after the personal expenses were deducted from the income or earnings of the deceased; to ascertain this it was necessary to ascertain first, the gross amount of such prospective income or earnings and then to deduct therefrom what the deceased would have expended as a producer to render the services or to acquire the money that she might be expected to produce, computing such

expenses according to her station in life, her means and personal habits, and then to reduce the net result so obtained to its present value. This is a correct statement of the rule as established in *McCabe* v. *Narragansett Electric Lighting Co.*, 26 R. I. 427, 27 R. I. 272; Reynolds v. Narragansett Elec. Lighting Co., 26 R. I. 457; Dimitri v. Cienci & Son, 41 R. I. 392.

To this portion of the charge defendants took an exception as follows: "to that portion of the charge which relates to the damages in which Your Honor charged the jury that the rule was that there should be deducted from the earning capacity the amount it would be necessary to enable the plaintiffs' intestate to produce that income, on the ground that there was no evidence of what it would cost her to produce that income." By this exception defendants do not apparently question the basis of the conputation of damages, namely, the earning capacity of deceased. The objection is not stated very clearly, but as exception is also taken to the refusal of the trial justice to grant a new trial on the ground that the verdict was against the law and that the damages are excessive, we think the question is fairly raised as to whether plaintiffs have offered the necessary proof of damages to sustain the verdict.

The first question is, Does the statute provide for the recovery of damages for the death of a married woman, who at the time of the accident is not engaged in an income producing occupation but whose time and energy are devoted to the maintenance of her household and the care of her husband and children? We answer this in the affirmative. The claim is that as the deceased was a housewife and was not engaged in any gainful occupation, there was no pecuniary loss caused to her estate by her death; that it is not sufficient to establish the fact that deceased had an earning capacity at the time of her death but there must also be proof of an actual loss of income which deceased was earning at that time; that the services of the deceased, although of value to her husband, were rendered

without expectation of financial return and presumably would continue to be so given until the end of her life and consequently her estate suffered no financial loss by her untimely decease. But why should this presumption be made for the benefit of the wrongdoer? If the husband should die or become incapable of supporting his wife, the wife would then have to support herself. There is no presumption that the husband will survive his wife. The mere fact that the person for whose death the action is brought was not at the time of death actually engaged in accumulating property or earning an income does not bar the right of recovery. If this were a bar to the action, the representatives or beneficiaries of a person who had given his services to charities or to the public would have no action. A construction of the act which led to such a result would, to a large extent, defeat the intent of the act. Under the common law the husband is entitled to the services of his wife and in return he is under the obligation to support her. Chapter 246, General Laws, provides that a married woman may carry on any trade or business as if she were single and unmarried, with the expressed exception that she cannot enter into any trading partnership with her husband. By this, and other statutes, the common law status of husband and wife has been much changed, although the effect of these statutes is not entirely to displace the common law. In McElroy v. Capron, 24 R. I. 561, it was said that the intent of this legislation is to place the married woman substantially on the same basis as a single woman as far as her legal rights and obligations are concerned. In Smith v. Smith, 20 R. I. 556, it was held that a married woman could maintain an action of trover against her husband for the conversion by him of her household furniture and other personal property. In Phillips v. Phillips, 39 R. I. 92, the right of the wife to enter into a contract with her husband was affirmed.

It thus appears that a married woman now in manyrespects is treated in law as if she were single. She is entitled to the benefit of her own earning capacity whenever she elects to exercise the right. In the absence of any such election her services still belong to her husband and he, not she, is entitled to sue for loss of such services. Larisa v. Tiffany, 42 R. I. 148. As the earning capacity of the wife belongs to her individually and is, in a certain sense, her property, defendants should not be permitted to escape liability for the destruction of such property right by reason of the fact that the wife has seen fit for the time being to give her services to her husband and family.

The action is one created by statute and is based on a new legal right which arises after death. The amount of the damages recovered is not assets of the estate and is not subject to the payment of estate debts or liabilities. Although, as held in McCabe v. Narragansett Electric Lighting Co., and other cases cited, the amount of recovery is to be measured on the basis of the loss to the estate and not to the bene-(4) ficiaries individually, yet the purpose of the act is not solely to enrich the estate of deceased as such, but also to provide for and distribute to the designated relatives of deceased a legal compensation for the loss caused by the wrongdoer. As the action is statutory, the construction of the statute in regard to details not expressly provided for by the terms of the act, unless a contrary intent appears therein, should be in accord and in harmony with the other laws of the state. The provision that one-half of the damages shall go "to the husband or widow" indicates an intention to establish an equality in the right of action given to the widow or to the surviving husband. At the time of the enactment of the statute, the majority of wives were not engaged in separate pursuits for their own enrichment and we see nothing in the act which requires such restriction of its benefits as is claimed by defendants. true that there is of necessity in many cases an unavoidable lack of certainty in the exact measurement of the damages, but this is not a valid argument for the denial of any recovery at all. The uncertainty in regard to earning

capacity and damages which exists in actions for the death of a minor, for loss to his estate after the time when he or she would have attained majority, is much greater than in the case at bar, but the right to recover for such loss is established. Dimitri v. Cienci & Son, supra.

Having come to the conclusion that there is a right of action given by the statute, we think the rule of damages is the same in this case as in other cases brought under the statute. As the right of plaintiffs to recover damages is based on the right of the deceased to use her earning capacity for her own benefit, we think for the purpose of fixing the damages the right of recovery upon the death of the wife should be the same as if she were a single woman, and that all of her necessary expenses in acquiring an income should be deducted from the total of her gross income. The present value of the net income is the correct measure of damages. Evidence of standard life tables and tables showing the present value of a dollar for various terms of years was properly admitted. From the testimony it appears that such services as deceased performed in the household would, according to the prevailing rate of wages, cost from ten to twelve dollars and upwards a week. But there was no evidence of the expense the deceased would have to incur to produce her income; consequently, there was no sufficient evidence upon which real damages, as distinguished from nominal damages, could be computed.

There was no reversible error in the trial or in the charge to the jury, but we think the trial justice erred in his refusal to grant a new trial. Judged by the law as correctly stated to the jury by the trial justice, the plaintiffs failed to produce the proof essential to the legal ascertainment of damages. As the verdict thus lacks the support of the necessary evidence to sustain it, it is contrary to law and should have been set aside by the trial justice. Defendants' exception on this point is sustained. The other exceptions are overruled.

The case is remitted to the Superior Court for a new trial.

VINCENT, J., dissenting. By the majority opinion this case goes back to the Superior Court for the reason that the testimony presented to the jury did not furnish a sufficient basis upon which the damages could be properly assessed.

The cases of McCabe v. Narragansett Electric Lighting Co., 26 R. I. 427, Reynolds v. Narragansett Electric Lighting Co., 26 R. I. 457, and Dimitri v. Cienci & Son, 41 R. I. 392, establish certain rules which must be complied with in ascertaining the amount of damages to which parties would be entitled in certain cases.

The measure of damages is the pecuniary loss sustained. The law does not recognize such damages as being in the nature of a penalty for the commission of a wrongful act on the part of a defendant.

Under the rule fixed by the above cases it is necessary to show the gross earnings and the personal expenses. The net earnings may then be ascertained by deducting the expenses from the gross amount. Taking the net result thus obtained and finding the expectation of life, the present value may be ascertained.

The plaintiffs in the case at bar offered testimony to the effect that a woman hired to perform the duties which devolved upon the deceased as a wife and mother would command a wage of fifteen dollars per week but they failed to show anything as to her personal expenses and for that reason the majority of the court finds that the jury was without evidence indispensable to the proper assessment of damages.

I make no criticism of the before-mentioned cases either as to their requirements or their applicability to situations where a pecuniary loss has been sustained.

In the present case no actual pecuniary loss has been shown. The husband and next of kin of the deceased have joined in a suit to recover such damages as have resulted to her estate by reason of her death. They are persons pointed out by the statute as entitled to sue for the benefit of her estate and nothing more.

The deceased at the time of her death was fifty-four years of age. She was a wife and mother who, during her married life, had devoted herself to her husband and children. Her services belonged to her husband and not to her estate. It was her duty to work for him, a duty imposed by the marriage relation. On the other hand, it was the duty of her husband to support her. These reciprocal duties the majority opinion acknowledges. The services which she rendered could not increase her estate nor could her expenses diminish it. She had no personal expenses which she was called upon to defray and she could not earn anything by rendering the services to her husband. Any contract which she might make with him for compensation for such services would be void.

In this situation the majority opinion holds that the husband might die first and the wife would then be obliged to support herself or that she might quit her family and become a wage earner. This is pure speculation. It cannot be inferred that the husband would predecease and there is nothing in the testimony from which any inference could be drawn that the wife would desert her family and go forth to earn her own living.

There is no statute in this state authorizing a recovery except for pecuniary loss, the majority opinion to the contrary notwithstanding. The opinion says, "Does the statute provide for the recovery of damages for the death of a married women, who at the time of the accident is not engaged in an income producing occupation but whose time and energy are devoted to the maintenance of her household and the care of her husband and children? We answer this in the affirmative." Such statute cannot be pointed out. Therefore, for this court to say that a recovery can be had for the benefit of the estate of the deceased, when the testimony clearly shows that no pecuniary loss has been or is likely to be suffered by her estate, amounts to judicial legislation.

The majority opinion says that the contention of the defendants is, "that the services of the deceased, although of value to her husband, were rendered without expectation of financial return and presumably would continue to be so given until the end of her life and consequently her estate suffered no financial loss by her untimely decease," and adds interrogatively, "But why should this presumption be made for the benefit of the wrongdoer?" The answer to that is twofold. In the first place the damages recoverable are by way of compensation for pecuniary loss and not as a penalty for wrongdoing and secondly, the only natural and reasonable presumption is that a woman fifty-four years of age who had always been devoted to her husband and family would continue to serve them, there being no suggestion of any intent or desire on her part to do otherwise.

Again the majority opinion says, speaking of a wife, "She is entitled to the benefit of her own earning capacity whenever she elects to exercise the right. In the absence of such election her services still belong to her husband and he, not she, is entitled to sue for loss of such services." She had never expressed, so far as appears, by word or act, the slightest intention or desire to avail herself of that privilege nor does it appear that she ever expressed any dissatisfaction with her situation and surroundings.

Other portions of the opinion might be discussed but I think I have said enough to clearly indicate my views. I think the case should be remitted to the Superior Court with direction to enter judgment for the defendants.

Pettine & DePasquale, for plaintiffs.

Waterman & Greenlaw, Ralph M. Greenlaw, Charles E. Tilley, for defendant.

CITY OF PROVIDENCE FOR BENEFIT OF ADELARD MAYO vs. SAMUEL GOLDENBERG.

SAME FOR BENEFIT OF THOMAS MAGUIRE, p. a. vs. SAMUEL GOLDENBERG.

MAY 29, 1922.

PRESENT: Sweetland, C. J., Vincent, Stearns, Rathbun, and Sweeney, JJ.

- (1) Bonds. Verdicts. Chancerization of Bond.
- In an action on a bond the jury found for the plaintiff and assessed damages in the penal sum of the bond and the jury chancerized the bond in a particular amount. The court received the verdict on chancerization of the bond and directed a verdict for the penal sum.—
- Held, reversible error, for under Gen. Laws, cap. 294, §§ 3 and 4, judgment should be entered for the penal sum before the court should proceed either with or without a jury to determine for what sum execution should issue, and moreover judgment could not be entered without consent of defendant until after the expiration of seven days after rendition of the verdict for the penal sum.
- (2) Bonds. Verdicts. Chancerization of Bond.
- It would seem that if parties to an action on a bond, desire to have the question of liability and also the question for what amount execution should be awarded, if the jury find for the plaintiff, decided at the same time by a jury, and at the same time reserve their respective rights to attack the verdict which may be rendered on the question of liability, they are entitled to agree with the consent of the court to allow the jury which passes on the question of liability to also pass upon the question as to the amount for which an excution should issue in the event of a final judgment for the plaintiff for the penal sum of the bond.
- (3) Bonds. Seals. Actions.
- A seal is required to constitute an instrument a bond, and where an action of debt on bond was brought on an instrument having all the formal requisites of a bond except that a seal was not attached, a motion to direct a verdict for defendant should have been granted.

Debt on Bond. Heard on exceptions of defendant and sustained.

RATHBUN, J. These two cases are actions of debt on bond, brought in the name of the City of Providence, for the benefit respectively of said Mayo and Maguire. The instrument upon which each of these actions is brought is termed a "Motor Bus License Bond" and contains all the formal requisites of a bond with the exception that no seal is attached to said instrument.

It appears that one Jacob Goldenberg desired to obtain from the Board of Police Commissioners of said city a license to operate a motor bus within said city for the purpose of transporting passengers for hire; that the instrument in question was executed by said Jacob Goldenberg as principal and by the defendant as surety and that by the terms of said instrument both principal and surety are bound to said city in the penal sum of \$2,000. The obligation clause in said instrument recites that said Board of Police Commissioners has pursuant to the provisions of the Public Laws of the State and the ordinances of said city granted to said principal a motor bus license and that said principal and surety have jointly and severally agreed to pay all damages sustained by any person and caused by any negligent or unlawful act on the part of said principal or his agents in the conduct of the principal's business as a motor bus operator. Said clause further provides that nothing contained in said instrument shall be construed as imposing any liability inconsistent with the law relative to contributory negligence.

The declaration in each case alleges that said Jacob Goldenberg as principal and the defendant Samuel Goldenberg as surety by their written obligation sealed with their seals jointly and severally promised to pay to said city the "sum of \$2,000 upon the terms and conditions set forth in said bond." The declaration in each case alleges as a breach of the condition of said "bond" that the motor bus of said principal, while employed in the business for which said license was granted, was negligently driven against the person for whose benefit the suit was brought to the injury of said person while he was in the exercise of due care.

The cases were tried together before a justice of the Superior Court sitting with a jury. The jury apparently found in each case that the negligence of said principal was

the proximate cause of the injury and that the person for whose benefit the first suit was brought was damaged to the extent of \$125, and that the person for whose benefit the second suit was brought was damaged to the extent of \$600. The verdict in the first case was as follows: "The jury find that the Defendant did promise and does owe in manner and form as the Plaintiff has in his declaration thereof complained against him and assess damages for the Plaintiff in the penal sum of \$2,000 and the jury chancerize said bond in the sum of \$125." The verdict in the second case was the same with the exception that the final figures were \$600 instead of \$125.

The transcript contains the following memorandum: "(Court received verdict of the jury on chancerization of the bond, and at the same time directed a verdict for the penal sum of the bond. Defendant's counsel thereupon objects and refuses to give his consent to such a verdict being received. Defendant's exception overruled and exception noted.)"

Each case is before us on the defendant's said exception and also on his exception to the refusal of the trial court to direct a verdict for the defendant.

Oid the trial court err in permitting the jury, which (1) rendered the verdict for the penal sum, to chancerize the bond, or in other words to determine the amount for which an execution should issue? Sections 3 and 4 of Chap. 294, Gen. Laws, 1909, provide as follows: "Sec. 3. In all actions brought for the breach of the condition of a bond, or to recover a penalty for the non-performance of any covenant, contract, or agreement, when it shall appear, by verdict, default, submission, or otherwise, that the condition is broken or the penalty forfeited, judgment shall be entered in the common form for the penal sum, but execution shall issue thereon as is provided in the following three sections." "Sec. 4. The court shall award an execution in such case for so much of the penal sum as shall then be due and payable in equity and good conscience, for the breach of the

condition, or other non-performance of the contract; which sum shall be ascertained and determined by the court, unless either party, before the day fixed for hearing thereon, shall move to have it assessed by a jury, or unless the court shall think it proper to have the question so decided, in which case the sum so due shall be assessed by a jury." We think it was the intention of the legislature, as expressed by sections of the statute above quoted, that judgment shall be entered for the penal sum before the court shall proceed, either with or without a jury, to determine for what sum execution shall be awarded. The jury were permitted, against the defendant's objection, to determine the amount for which an execution should be awarded although judgment for the penal sum had not been entered. Judgment could not have been entered without consent until after the expiration of seven days after rendition of a verdict for the penal sum, as the defendant was entitled to have said verdict remain open for a period of seven days in order that he may have an opportunity to commence proceedings to attack the verdict.

In Bowen v. White, 26 R. I. page 71, this court said: "The jury should have found affirmatively or negatively upon the issues, which, like all issues in the action of covenant, were special. Then, after judgment for the penal sum of the bond, the court or another jury should have assessed the damages, according to equity and good conscience." See also Blaisdell v. Harvey, 25 R. I. 572; Tilley v. Cottrell, 21 R. I. page 310.

It was argued that there would be a saving of time and effort by having the amount for which an execution should be awarded determined at the time of the decision or verdict for the penal sum. It is a sufficient answer to say that the legislature has prescribed a different procedure. The defendant's exception to the action of the court in permitting the jury, which found that there had been a breach of the instrument termed a bond, to also determine at the same time the amount for which an execution should be awarded is sustained.

It was stated at the hearing that a practice prevailed in the Superior Court of submitting to the same jury, by agreement of parties, the question of liability on the bond and the question as to the amount for which an execution should be awarded. Parties, of course, may, with the consent of court, agree that, in the event of a verdict for the penal sum, judgment may be entered forthwith for the penal sum and also agree that the jury may proceed to fix the amount for which an execution should be awarded. judgment is entered for the penal sum it would seem that the defendant would be precluded from thereafter questioning the correctness of the verdict for the penal sum; but if the parties with the consent of court agree to waive their rights to have reviewed the findings of the jury on the question of liability on the bond we think they may properly do so and have both questions at the same time submitted to the jury.

Should the parties in an action of this nature desire to submit both questions at the same time to the same jury and reserve their respective rights to attack the verdict (2) which may be rendered on the question of liability, we think they are entitled to agree, with the consent of court, to allow the jury which passes upon the question of liability on the bond to also pass upon the question as to the amount for which an execution should issue in the event of a final judgment for the plaintiff for the penal sum of the bond.

The defendant's other exception is to the refusal of the court to direct a verdict for the defendant. The defendant contends that in as much as the instrument (in the form of a bond) upon which liability was based did not bear a seal said instrument was not a bond and that the actions should have been brought in assumpsit instead of in debt on bond.

9 Corpus Juris, at page 14, states the rule as follows: "As a general rule, in the absence of statute providing otherwise, a seal is of the essence of a bond, and no writing can have the qualities which attach to a bond without the seal of the party executing it, and in the absence of a seal an

instrument will not be construed as a sealed bond, although there is a recital in the body thereof that the obligors and parties have set their hands and seals thereto."

There has been considerable legislation throughout the United States tending to partially or totally abolish the use of seals. In this State the legislature has dispensed with (3) the use of seals in a number of instruments which at common law were required to be sealed. Neither a general nor a special release nor an instrument discharging a mortgage, in whole or in part, is required to be sealed. Gen. Laws, 1909, Chap. 253, § 12. An instrument purporting to convey real estate is a deed although unsealed. The word "covenant" in a deed or instrument to which no seal is affixed has the same effect as though a seal had been affixed thereto. Sec. 4 of said chapter. Section 14, Chap. 32, Gen. Laws, 1909, provides as follows: "Section 14. Whenever a seal is required to be affixed to any paper, the word 'seal' shall be construed to include an impression of such seal made with or without the use of wax or wafer on the paper." This language clearly shows that the legislature did not intend to dispense with the use of seals on all instruments. In Providence Telegram Co. v. Crahan Engraving Co., 24 R. I., at 177, STINESS, C. J., said: "As to bonds. there has been no change in the law, and seals seem still to be required."

As the instrument upon which these suits were based is not a bond and as the suits were actions of debt on bond we think that the trial justice should have granted the defendant's motion to direct a verdict in his favor and that the failure to do so was error.

At the time of argument the plaintiff filed a motion that this court permit the declaration to be amended by adding a count in assumpsit. In view of the conclusions which we have already reached we think that the motion must be denied. The motion is denied without prejudice as to any rights which the plaintiff may have to commence any action other than debt.

The plaintiff, if it shall see fit, may appear before this court on the next motion day at ten o'clock a. m., and show cause, if any it has, why an order should not be entered remitting each case to the Superior Court with direction to enter judgment for the defendant.

George F. Troy, for plaintiffs. Charles R. Easton, for defendant.

NICOLA GIZZARELLI vs. WALTER A. PRESBREY et al.

JUNE 6, 1922.

PRESENT: Sweetland, C. J., Vincent, Stearns, Rathbun, and Sweeney, JJ.

- (1) International Law. License to Operate Motor Bus. Constitutional Law.
 Cap. 93, § 4, ordinances of the city of Providence, providing that no license to operate a motor bus shall be granted to one who is not a citizen of the United States, is not in violation of the treaty between the United States and Italy, providing that the citizens of the respective countries shall enjoy the same rights and privileges as nationals, and is not unconstitutional under the equal protection provisions of the 14th amendment of the constitution of the United States.
- (2) Constitutional Law. International Law.

The test of legislation denying rights to aliens is not whether there is a discrimination against aliens, but whether there is any proper basis for such discrimination.

Mandamus. Heard on petition for writ and denied.

STEARNS, J. The proceeding is by petition for a writ of mandamus.

The petitioner is a foreign born subject of the King of Italy and a resident of the city of Providence. The respondents are the police commissioners of Providence. The petitioner, who had operated a passenger motor bus on the public highways in the city of Providence, after the enactment in December, 1920 of Chapter 276 of the ordinances of the city of Providence, made application to the respondent commissioners for a license to operate a motor bus. The

application was denied for the reason that petitioner was not

a citizen of the United States. Section 4 of Chapter 93 of the city ordinances provides that no person shall operate a motor bus in any street in the city without first obtaining an annual license therefor from the police commissioners, and that no such license shall hereafter be granted to any person who is under the age of twenty-one years, or not a resident of this state or who is unable to carry on an intelligible conversation in the English language or who is not a citizen of the United States. The claim is that Section 4 is invalid. in that it is a discrimination against citizens of Italy and a violation of the treaty between the United States and the Kingdom of Italy of 1871 as supplemented by the treaty of (1) 1913. Article 3 of the treaty provides that: "The citizens of each of the high contracting parties shall receive in the states and territories of the other the most constant security and protection for their persons and property and for their and shall enjoy in this respect the same rights and privileges as are or shall be granted to nationals, provided that they submit themselves to the conditions imposed on the latter."

The question thus raised is to be determined by construction of the treaty, and this is now established by judicial decisions. In Patstone v. Pennsylvania, 232 U.S. 138, it was held in construing this treaty, "that the equality of rights that the treaty assures is equality only in respect of protection and security for persons and property;" that a law of Pennsylvania making it unlawful for any unnaturalized foreign born resident to kill wild game except in defence of person or property and to that end making it unlawful for such foreign born person to own or possess a shot gun or rifle, with a penalty of twenty-five dollars and a forfeiture of the gun or guns, was not unconstitutional under the equal protection provisions of the fourteenth amendment of the Constitution of the United States nor was it in violation of the treaty with Italy; that a state may protect its wild game and preserve it for its own citizens;

also, the fact that the act discriminates against a particular class, namely aliens, does not invalidate the law. At p. 144, the general principle is stated that "a state may classify with reference to the evil to be prevented; and that if the class discriminated against is, or reasonably might be considered to define those from whom the evil mainly is to be feared, it properly may be picked out. . . . may direct its law against what it deems the evil as it actually exists without covering the whole field of possible abuses." In Commonwealth v. Hana, 195 Mass. 262, it was held that a statute providing that licenses to hawkers and peddlers should be granted only to a citizen, or one who has declared his intention of becoming a citizen of the United States, did not violate the fourteenth amendment, and that such discrimination against aliens was a valid exercise of the police power.

Authority to use the public highways as a common carrier of passengers for hire is not a right belonging to the individual but is in the nature of a privilege. Child v. Bemus, 17 R. I. 230; Morin v. Nunan, 91 N. J. L. 506. The ordinances in question were enactments made in the exercise of the police power delegated to the city council by the legislature. Fritz v. Presbrey, 44 R. I. 207. Due consideration for the safety of the public requires that a careful selection should be made of the individuals to whom authority is given to use the public highways as carriers of passengers for hire. We think it fairly may be said that as aliens as a class are naturally less interested in the state, the safety of its citizens and the public welfare, than citizens of the state, to allow them to operate motor buses would on the whole tend to increase the danger to passengers and to the public using the highways. It is clear that we can not say that the evil to be apprehended and the proposed remedy are so dissociated as to warrant the court in holding the ordinance to be invalid. As there is a basis for the distinction made between citizens and aliens and for such a classification as made, the ordinance is not repugnant to the

fourteenth amendment of the constitution of the United States nor is it in violation of the treaty with Italy. Crane v. People of State of New York, 239 U.S. 195; Heim v. McCall, 239 U. S. 175; Trageser v. Maryland, 73 Md. 250. In no event can petitioner's rights be greater than those of citizens of other states of the Union. The power of the state in proper cases to make a distinction between its own citizens and citizens of other states has frequently been upheld. For instance, the state can prohibit citizens of other states in the Union from taking ovsters in the navigable waters of the state. State v. Medbury, 3 R. I. 138; from catching lobsters within the jurisdiction of the state. State v. Kofines, 33 R. I. 211; can prohibit non-residents from catching fish for the manufacture of manure and oil and the manufacture of manure and oil from fish caught within the waters of the state, Chambers Bros. v. Church & Co., 14 R. I. 398. The right of the state to deny to aliens the right to practice law is undoubted. 1 R. C. L. 803. test of such legislation is not whether there is a discrimina-(2) tion against aliens, but rather is there any proper basis for such discrimination.

The ordinance does not interfere with the rights of aliens to engage in the ordinary kind of business and thereby to earn a living, or with any right of property, but denies to them certain privileges which the state in the exercise of its police power can grant or withhold in its discretion.

We find that the ordinance is valid.

The petition for writ of mandamus is denied and dismissed.

Pettine & DePasquale, for petitioner.

Elmer S. Chace, City Solicitor, Herbert E. Eklund, Asst. City Solicitor, for respondents.

WENCESLAO BORDA US. AVICE WEED BORDA.

JUNE 15, 1922.

PRESENT: Sweetland, C. J., Vincent, Stearns, Rathbun, and Sweenev, JJ.

(1) Divorce. Extreme Cruelty.

Although there may be no evidence of physical violence, yet a course of conduct toward a petitioner for divorce, wilfully and maliciously persisted in which naturally results in causing wretchedness of mind affecting the health and rendering it impossible to longer endure conjugal relations with a respondent warrants a finding of extreme cruelty.

(2) Divorce. Evidence. Admissions.

The fact that a petitioner for divorce coupled an admission that he was the father of a child with the statement unquestionably false that respondent was its mother, will not result in such untruth as to the maternity of the child negativing his admission that he was the father and hence guilty of adultery when such finding is also supported by a mass of circumstantial evidence.

(3) Divorce. Gross Misbehavior.

A finding that petitioner was guilty of gross misbehavior and wickedness repugnant to and in violation of the marriage covenant is supported by evidence that petitioner consorted with another woman, caused respondent to be recorded on the public records as the mother of the child of another woman and caused the child to be baptized as the lawful child of himself and respondent.

(4) Divorce. Depositions.

Depositions may be taken in divorce cases before a standing master in chancery under Gen. Laws, cap. 292, § 40, without a special order of the court referring the matter to the master.

(5) Divorce. Evidence. Records.

In a divorce proceeding, copy of birth certificate recorded in the public records, was properly admitted in connection with the testimony of the physician who had made and filed such certificate and also copy of baptismal record of the child made in a church, in connection with the testimony of the priest who made the record.

DIVORCE. Heard on exceptions of petitioner and overruled.

SWEETLAND, C. J. The above entitled cause is a petition for divorce in which the respondent availing herself of the statutory provision in that regard has filed a motion in the

nature of a cross petition in which she asks for the affirmative relief of an absolute divorce from the petitioner.

The petitioner has not prosecuted his petition but after the filing of respondent's said motion has sought to discontinue. This the petitioner was not permitted to do, and thereby impair the respondent's right to have a hearing and determination upon her motion in the nature of a cross petition. Borda v. Borda, 43 R. I. 384.

The respondent's motion was heard in the Superior Court before Mr. Justice Hahn, who entered his decision granting the respondent an absolute divorce from the petitioner upon the grounds that the petitioner was guilty of extreme cruelty toward the respondent, of adultery, and of gross misbehavior and wickedness repugnant to and in violation of his marriage covenant with the petitioner, in that he consorted with another woman, and that he caused the registration of the birth and the making of the baptismal record of a child as that of himself and the respondent when said child was not that of the respondent.

At the hearing before Mr. Justice Hahn the petitioner appeared by counsel and, although he did not testify or present evidence in defence, he did contest the granting of the respondent's motion by the cross-examination of her witnesses and by numerous objections to the rulings of said justice made at the hearing; his exceptions to which rulings he has pressed before us.

Prior to said hearing the petitioner had been enjoined by the Superior Court from prosecuting a proceeding for divorce from the respondent which he had instituted in Porto Rico after the filing of his petition and the motion of the respondent. Although it appeared to said justice that the petitioner had violated the decree of injunction and was in contempt, nevertheless no objection was offered by the respondent and the petitioner was given a full opportunity to present such evidence as he desired in support of his original petition and in defense of the cross petition of the respondent.

The petitioner excepted to the ruling of said justice in which he refused to dismiss the respondent's motion in the nature of a cross petition. The petitioner contended in the Superior Court, and also before us, that the evidence shows that the respondent was not a domiciled inhabitant of Rhode Island for two years prior to the filing of said motion and hence that the Superior Court did not have jurisdiction to hear and grant said motion. The exact domicile of the petitioner at the time of filing his petition is somewhat He clearly was not a domiciled inhabitant of uncertain. Rhode Island. He did reside for portions of the year in Porto Rico but the evidence supports the finding of the justice that the petitioner was, as he himself alleges in his petition, a resident of the city of New York. The respondent before her marriage to the petitioner had been a resident of the town of Narragansett. When, as she claims and as said justice found, she was forced to leave the petitioner in 1916 because of his cruel treatment of her, she returned to Narragansett, where she owned a house which she occupied and where she had lived for about three years and a half just before the filing said motion. The evidence warranted the finding of said justice that for more than two years prior to filing her motion in the nature of a cross petition the respondent had the intention of making the town of Narragansett her permanent residence and that she was a domiciled inhabitant of this state within the requirement of the statute. The petitioner being without a domicile in this state was obliged to rely upon the domicile of his wife in order to give the Superior Court jurisdiction over his petition for divorce and in said petition he made oath that the respondent has been "a domiciled inhabitant of the State of Rhode Island and has resided in said state, to wit, in the town of Narragansett, in Washington county, for a period of more than two years next before the preferring of this petition."

The petitioner excepted to the decision of said justice that the petitioner had been guilty of extreme cruelty towards

the respondent. There was no evidence before said justice of physical violence upon the part of the petitioner toward the respondent but there was shown a course of conduct on the petitioner's part, wilfully and maliciously persisted in, which naturally resulted in causing in the respondent a wretchedness of mind affecting her health and making it impossible for her to longer endure conjugal relations with the petitioner. This court has departed from the doctrine of earlier cases requiring evidence of physical violence or of threats of such violence to establish a charge of extreme cruelty in divorce. Grant v. Grant. 44 R. I. 169. The justice was warranted in finding that the respondent was in ill health from the time of her marriage to the petitioner to the time of their separation: that she was very fond of her daughter, the issue of a former marriage, and also of a sister and a daughter adopted by her before her marriage to the petitioner: that the respondent assisted these three women financially; that contrary to the wish of the petitioner she intended to provide liberally for them in any testamentary disposition that she might make of her extensive property; that the petitioner persisted in most cruel and vile attacks upon the moral character of these women, especially the respondent's daughter and sister; that he did this in letters written to the respondent and also in conversations with others in her presence, in public places, in hotels and restaurants in New York and on numerous occasions at their home in Porto Rico in the presence of servants and guests who were of the highest political and social standing in the island. These statements do not appear to have been made by the petitioner in anger but with a malicious intention of humiliating the respondent and destroying her peace of mind. The respondent testified that she had destroyed most of the letters of this nature which the petitioner had written to her. One letter is in evidence as an exhibit in the case. The statements in this letter as to the character of the respondent's daughter and sister are unspeakably vile, particularly with reference to that of the

daughter. The continued abuse of those who were very dear to her can have had no purpose save to cause pain to the respondent. This deliberately cruel conduct of the petitioner undoubtedly affected the already impaired health of the respondent, as she claims that it did, and as her physician testified would be its natural result.

The petitioner excepted to the decision of said justice that the petitioner was guilty of adultery. The justice was warranted in finding from the testimony that for a considerable period in September and October of 1917, the petitioner and a woman, who was not his wife and was then known as Mrs. Borden, were living at the same hotel in New York City, and were very closely associated there; that he consulted with a physician in regard to her condition and was present in her room at the hotel when said physician attended her; that on November 1, 1917, this woman was delivered of a male child at a private lying-in hospital in New York City: that the petitioner was a frequent visitor at said hospital during her confinement and delivery, and was much interested in her condition; that he gave to the physician in attendance upon the woman the information from which the certificate of birth was made for public record; that he then stated that he was the father of the child and that the said women was his wife. Avice Weed Borda, this respondent; that shortly after the birth, the mother and child, accompanied by a nurse, returned to the hotel where they and the petitioner continued to live for several weeks; that the petitioner personally sought a baby specialist to attend the child; that the child was then placed by the petitioner in the care of the petitioner's aunt, in whose family the child has lived up to the time of the hearing; that the petitioner took the child, the petitioner's aunt and an intimate friend in a cab to a Catholic church in New York City and there on December 6, 1917, he caused the child to be baptized as Wenceslao Borda, Jr.; that by his invitation said friend became the godfather of the child and the petitioner's aunt became the godmother; that he caused

the baptismal record to be made in the church that he was the father of said child and that this respondent was the mother: that the petitioner has visited the child frequently and has had him brought to the petitioner's apartments in New York City and to his residence in Porto Rico; that he exhibited marked affection for the child and referred to him as "his Billy," and as "his child." The above facts were unknown to the respondent until after the filing of this petition for divorce against her. All of these facts appeared in the depositions of witnesses taken a number of months before the hearing in the Superior Court. At the taking of these depositions the petitioner was represented by counsel, who cross-examined the witnesses. serious charges the petitioner has offered no answer, neither by his own testimony nor by that of other witnesses. cause of the mass of circumstantial evidence supporting it. the iustice was warranted in accepting as true the admissions of the petitioner as to the paternity of the child Wenceslao Borda, Jr., born November 1, 1917, and in finding that the petitioner was guilty of adultery with the mother of the child, known as Mrs. Borden, during the early part of the vear 1917.

Petitioner's counsel suggests that the petitioner's admission that he was the father of said child should be entirely disregarded because he coupled that admission with the statement unquestionably false that the respondent was the (2) child's mother. The petitioner will not be permitted for his own purposes thus to invoke the maxim falsus in uno, falsus in omnibus, a maxim applicable in attacking the credibility of an adversary witness. The object of the petitioner in causing the respondent falsely to be recorded as the mother of this child can only be inferred from the testimony. The inference may be drawn that regardless of his wife's rights or wishes he desired to procure a record of legitimacy for a natural child of his that he had decided to acknowledge, or the inference of said justice is warranted that the purpose of the petitioner was in this way to lay the

foundation for a claim in-favor of himself and his child upon the respondent's estate in case of her decease. Whatever may have been the petitioner's object his conduct was reprehensible and without reasonable and convincing explanation warrants the conclusion that it had an evil purpose. Although his statements that the respondent was the mother of the child were false, such untruth does not negative his own admission that he was the father and hence guilty of adultery, which is supported by the circumstances noted above.

Counsel have argued to us that the conduct of the petitioner in connection with the birth of the child, his statements for the purpose of public record and baptism, and his subsequent relations with the child do not have the significance that said justice has given to them, but that these circumstances should be regarded merely as indications of a purpose in the petitioner to adopt as his own the child of other parents. The petitioner has not seen fit to come into court and make this explanation for himself. Counsel have stated to the court that they are not in his confidence in that regard and are unaware of the real meaning of the petitioner's action. The statement and admissions of the petitioner, himself, and what said justice has properly found to be the natural meaning and intent of his conduct, should be given greater weight than the unsupported conjecture of counsel.

The petitioner has excepted to the decision of said justice that the petitioner was guilty of gross misbehavior and wickedness repugnant to and in violation of the marriage covenant in consorting with another woman and in causing the respondent to be recorded in the public records of the city of New York as the mother of the child of another woman and in causing said child to be baptized as the lawful child of himself and the respondent. The evidence fully warrants these findings. The first of these offences against the marriage covenant is licentious in its character, the last two, in their painful effect upon the mind and

feelings of the respondent, partake of the nature of cruelty. They thus conform to the requirements for such causes of divorce as the same were set out by this court in *Stevens* v *Stevens*, 8 R. I. 557.

The petitioner excepts to the ruling of said justice in

receiving the depositions, taken in this state with all legal formality before a standing master in chancery but not upon the special reference and order of the court. The statute provides, Section 40, Chapter 292, General Laws, 1909, that "In all divorce proceedings the testimony shall be given in open court. . . . (3) unless the deposition be taken (4) before a standing master in chancery." The petitioner contends that a proper construction of this statute requires that, before a standing master in chancery can have authority to take a deposition to be used in divorce proceedings, the taking of such deposition must be referred to him by a special order of the court in accordance with the ordinary practice in equity concerning references to masters in chancery. Such has not been the construction which in practice has been placed by the court upon this statutory provision since its enactment. Depositions have been received without question when taken with legal notice and formality before a standing master in chancery upon the request of a party acting through his counsel. We see no sufficient reason for disturbing this well established practice.

The petitioner excepted to the rulings of said justice at the hearing admitting in evidence a copy of the birth certificate and the corrected birth certificate of said child recorded in New York City, and also a copy of the baptismal record of said child made in said Catholic church in New York City. There was no error in these rulings. Said certificate and corrected certificate were properly received by the court in connection with the testimony of the physician who had made and filed said certificates; and the copy of the baptismal record was properly received in

This exception should be overruled.

connection with the testimony of the priest who had made the record.

We have examined the large number of exceptions taken by the petitioner to the rulings of said justice in the admission of testimony and we find no merit in any of them.

The petitioner has appealed from the decree of the Superior Court enjoining the prosecution of the divorce proceedings in Porto Rico. There is no merit in said appeal. The decree of the Superior Court is affirmed and our affirmation of the same is ordered certified to the Superior Court.

All of the exceptions of the petitioner are overruled and the case is remitted to the Superior Court for further proceedings in accordance with the decision of said justice.

Knauer, Hurley & Fowler, for petitioner. Tillinghast & Collins, for respondent.

STEPHEN C. HARRIS et al. vs. ARCHER GREENE et al.

JUNE 20, 1922.

PRESENT: Sweetland, C. J., Vincent, Stearns, Rathbun, and Sweeney, JJ.

(1) Wills. Trusts. Time of Dividing Trust Estate.

Testamentary provision "when the youngest child of my youngest son shall have reached the age of 21 years, then my said trustees are to divide, distribute and convey as in their judgment they shall deem best all said business capital . . . equally to said male children and daughters born subsequent to the date of this will, the children of any deceased child taking his proportionate share of his fathers and mothers realty and personalty."

Held, that the time for division and distribution of the trust estate was postponed until it was no longer possible for the youngest son of the testator to have children and his then youngest child reached the age of 21 years.

BILL IN EQUITY for construction of will. Certified from Superior Court for determination.

SWEETLAND, C. J. This is a bill in equity brought by the trustees under the will of Rufus Greene, late of Providence,

deceased, praying for the construction of said will and for instruction relating thereto. The cause being in the Superior Court ready for hearing for final decree has been certified to this court for determination.

By the eighth clause of said will the testator provided for the distribution of the income arising from certain property placed in trust for the benefit of his wife and sons, and then directed as follows: "And when the youngest child of my youngest son shall have reached the age of twenty-one years, then my said Trustees are to divide, distribute and convey as in their judgment they shall deem best all said business capital, realty, profits, dividends and earnings equally to said male children and daughters born subsequent to the date of this will, the children of any deceased child taking his proportionate share of his fathers and mothers realty and personalty." The testator had six sons who survived him. One of said sons has since died leaving issue and three have died without issue. Two sons, Archer Greene and Howard Greene, are now living. No child was born to the testator subsequent to the date of said will. Howard Greene is the youngest son of the testator and is now fifty-one years old. The youngest child of said Howard is one Richard D. Greene, who became twenty-one years of age on November 22, 1921.

Because said Richard D. Greene has reached the age of twenty-one years request has been made that the trustees now make a division of said trust estate under the provisions of the eighth clause of said will quoted above. Said trustees, however, doubt their authority to make division as requested and have brought this bill for the construction of said clause and for instruction. The trustees propound the following questions in their bill: "(a) Did the time for the distribution of the estate, provided for in the quoted paragraph of the eighth clause, arrive when Richard D. Greene, the youngest son of Howard Greene, became twenty-one years of age, that is to say on November 22nd 1921? or (b) Is the distribution of the estate under the

provisions of said paragraph to be postponed until it is no longer possible for the said Howard Greene to have children and his then youngest child reaches the age of twenty-one?"

In the construction of all testamentary provisions the intention of the testator if it can be ascertained must govern. Such intention of necessity will be sought in the language of the provision, and nothing is to be inferred save what is a necessary implication. The testator clearly provided that the time of division and distribution of the trust fund in question should be "when the youngest child of my youngest son shall have reached the age of twenty-one years." Richard D. Greene is at present the youngest, and as far as has been made to appear perhaps also the oldest child, of Howard Greene, the testator's youngest son. Richard D. Greene answer the description of the youngest child of Howard Greene within the meaning of that phrase in said provision. The law presumes that Howard Greene is capable of having children until his death, and until that event it can not be determined as to who will be his youngest child. In the absence of a specific provision to that effect the testator can not be assumed to have meant the youngest child of his youngest son at any particular point of time during the life of that son but the youngest child absolutely and without qualification. Question would have arisen as to the time of division and distribution if Howard Greene had died without having had issue or if his youngest child should not live to attain the age of twenty-one years. Neither situation has arisen and such questions are not before us; but the possibility that either may arise should not, in our opinion, lead us to the conclusion that the time for division was reached when Richard D. Greene attained his majority.

It has been suggested to us that the testator should not be presumed to have intended that the division of the estate held in trust might be postponed until twenty-one years after the death of the testator's youngest son and possibly

until twenty-one years after the death of the survivor of all his sons. That is the effect of the testator's language in creating the trust. If we were permitted to conjecture as to his intention we might consider it as by no means improbable that the very result suggested to us was within the contemplation and intention of the testator. has been before the court on two previous occasions for the construction of certain provisions other than the one now before us. In Robinson v. Greene. 14 R. I. 181, the court, at page 188, said regarding the purpose of the testator: "Apparently, if we look into the will at large, the purpose. of the trust was to tie up the property for the beneficiaries, giving them the rents and profits, and putting the corpus or principal beyond their control. In the case of the sons the property is so tied up until the youngest son of the youngest son attains his majority, the apparent purpose being to postpone the period of distribution to a distant future."

In Robinson v. Greene, 17 R. I. 771, the court was considering the provisions of the will as to the time of distribution of a certain estate held in trust for the benefit of the testator's daughters and the descendants of deceased daughters. The court found the provision to be in itself ambiguous, and the court was forced to consider other provisions of the will for the purpose of ascertaining its Among other provisions from which the court meaning. derived assistance was that in which the testator provided that said trust property should be divided and distributed "equally among said daughters and the children or grandchildren of deceased daughters share and share alike." From this the court said, "It is clear that he did not mean to postpone the division to the limit of a perpetuity, for what follows in the very clause in question provides for a division among living daughters." In the clause now under consideration the testator provides that at the time of division the trustees shall divide, distribute and convey the trust property "equally to said male children and daughters

born subsequent to the date of the will, the children of any deceased child taking his proportional share of his fathers and mothers realty and personalty." It has been suggested to us that applying the reasoning of the court in Robinson v. Greene, 17 R. I. 771, we should find in the somewhat similar language of the provision before us an intention to divide among living sons. Such finding might be of assistance if the time of distribution was doubtful. suggestion it should be said that we are not in the former position of the court. We are not called upon to construe an ambiguity. The time of division is plainly fixed, and the purpose of the testator was to delay division until that time. If any of his sons are then alive he intended that they shall share in such distribution together with daughters then alive, born subsequent to the date of the will, and with the children of deceased sons and deceased daughters, who were born subsequent to the date of the will. Only to that extent do we find the intent of a division among living sons of the testator.

Answering the request of the trustees for instruction we say that the time for division and distribution of said trust estate did not arrive when Richard D. Greene became twenty-one years of age, and that division and distribution is to be postponed until it is no longer possible for Howard Greene to have children, and his then youngest child reaches the age of twenty-one years.

On July 3, 1922, the parties may present a form of decree in accordance with this opinion.

Henshaw & Sweeney, for complainants and respondents.

INDUSTRIAL TRUST COMPANY, Admr. vs. James McLaugh-Lin et al.

JUNE 22, 1922.

PRESENT: Sweetland, C. J., Vincent, Stearns, Rathbun, and Sweeney, JJ.

- (1) Wills. Gift to Class. "Children."
- By will executed in 1913; testator devised to each of three children a specifically designated parcel of land, of practically the same value; in 1915 another child X was born and thereafter testator purchased another parcel of land of about the same value as the other parcels; and frequently referred to the last parcel as a home he had provided for X. Testator never changed his will, which provided that one-third of the residue should go to his wife and "the remaining two-thirds to my children, the childrens' share, to be held in trust."
- Held, that in the absence of a testamentary devise or a conveyance or declaration of trust, X. did not obtain any special interest or share in the last parcel of land.
- Held, further that the gift to the children of a share in the residue being immediately operative upon testator's death, the members of the class coming under the designation of "my children" were to be ascertained at that time and the class included all of the four children of testator who survived him.
- (2) Wills. Inconsistent Provisions.
- Where two provisions in a will, each in itself explicit, are inconsistent, and there is no specific or general intent apparent in the will excluding the conclusion that the primary intention was forgotten or changed, and there is no-construction which will uphold both provisions, the later provision must prevail.
- (3) Wills. Inconsistent Provisions. Conditional and Absolute Gifts.
- Where there is no general intent apparent in a will warranting such action, the court cannot harmonize the provisions of a conditional and an absolute devise by destroying the later absolute gift.
- (4) Wills. Sale of Property.
- In one clause of a will testator requested that all the wood lots, timber lands and tillage lands be sold as soon as convenient at public auction and the proceeds become a part of the general estate out of which the legacies might be paid if necessary and in a later paragraph gave authority to his executors and trustees to sell both real and personal property at private sale or public auction.
- Held, that the "request" in the first clause was directory merely as to the time and manner of the sale of the lands therein referred to and that in the later clause power was given to the executors to sell the wood lots, timber lands and tillage lands either at private sale or public auction in their discretion.

(5) Wills. Sale of Estate. Administrator with Will Annexed. Powers.

Where testator named his wife and brother as joint executors and trustees and gave the residue one-third to his wife and two-thirds to his children, the provision to the children being in trust, and the wife and brother resigned as executors and complainant trust company was appointed administrator de bonis non with the will annexed, and the will authorized the executors and trustees to sell both real and personal estate at public auction or private sale and to invest the proceeds:

Held, that the sale of the real estate was to be made in furtherance of the duties of the executors in settling the estate and there was nothing to indicate that the power to sell was given to the executors as individuals apart from their office and hence under Gen. Laws, cap 312, § 26, the trust company as administrator with the will annexed succeeded to the power of the original executors.

Held, further, that as the power to sell was specifically given to the executors, by the testator, the administrator needed no special authorization for sale from the court.

BILL IN EQUITY seeking construction of will.

SWEETLAND, C. J. This is a bill in equity asking for the construction of certain provisions of the will of John Mc-Laughlin, late of the town of Cumberland, deceased, and for instructions. The cause being in the Superior Court ready for hearing for final decree has been certified to this court for determination.

The will is inartistically drawn and was executed June 9, 1913. At that time the testator had living a wife, Elizabeth McLaughlin, and three minor children who are respondents here. In the Superior Court a guardian ad litem was appointed for said three minors. On January 25, 1915, another daughter was born to the testator, the respondent Helen McLaughlin, for whom in the Superior Court a guardian ad litem was appointed other than that for the other three minors. Each of these guardians argued before the court in support of the interests of their wards, and has filed carefully drawn briefs. Without adding a codicil to his will, the testator died on March 18, 1917. In said will the testator named his wife Elizabeth McLaughlin and his brother James McLaughlin as joint executors and trustees. These qualified as executors and served for a time. They

then resigned, and the complainant trust company was appointed administrator de bonis non with the will annexed, has accepted the office and qualified as such.

The first question as to which instructions is asked is as to what share, if any, the respondent Helen McLaughlin takes in the estate of the testator.

In the will the testator devises to each of his three children, as part of his bounty to them, a specifically designated parcel of land with a house thereon. In the Superior Court evidence was introduced from which it clearly appears that these pieces of real estate given to his children were of practically the same value; that after the birth of Helen he purchased another parcel, known as the Budlong Farm, of about the same value as the other parcels; and that afterwards during his life, in the presence of his wife, the testator frequently referred to the Budlong Farm as a home which he had provided for Helen. He never changed his will, however, or took other appropriate action to carry his purpose into effect. In the absence of a testamentary devise, or a conveyance or declaration of trust in writing signed by said John McLaughlin, Helen does not, by reason of the circumstances appearing in said evidence, obtain any special interest or share in the Budlong Farm. (Section 2, Chapter 253, Gen. Laws, 1909.)

After a certain legacy and certain devises, the testator provided by his will that one third of all the rest, residue and remainder of his estate should go to his wife "and the remaining two thirds to my children, the childrens' share, however, to be held in trust." Before us the parties have discussed as to whether Helen shares in this gift to the testator's children or whether as to Helen the testator should be held to have died intestate in accordance with the provisions of Section 22, Chapter 254, General Laws, 1909, which is as follows: "When a testator omits to provide in his will for any of his children or for the issue of a deceased child, they shall take the same share of his estate that they would have been entitled to if he had died in

testate, unless it appears that the omission was intentional and not occasioned by accident or mistake."

The complainant avers in the bill that "no provision for said minor daughter Helen was made by said will or by codicil thereto." The language of the gift of two-thirds of the residue of the estate is not to the testators' children (1) designated by name, nor does the testator in any other manner restrict the gift to his children alive at the time of making the will. Ordinarily such a gift as one "to my children," without more, is construed as a gift to a class in the absence of an intention to be gathered from the will that it is one to indviduals. The fact that at the time this will was made Helen was as yet unborn is not a circumstance which alone would indicate an intention to restrict the right to share in the residue to the testators' three children then alive. A will speaks and takes effect as if executed immediately before the death of the testator. That is the general rule recognized in our cases. Coggeshall v. Home for Children, 18 R. I. 696; Hazard v. Gushee, 35 R. I. 438; R. I. Hospital Co. v. R. I. Homeopathic Hospital, 87 Atl. 177. Our statute also provides in Section 6, Chapter 254, General Laws, 1909, that every will shall be construed with reference to the real and personal estate comprised in it to take effect from the death of the testator unless a contrary intention appears in the will. The gift to the testator's children of a share in the residue of his estate, being immediately operative upon his death, the members of the class who come within the designation of "my children" are to be ascertained at that time, and the class includes all of the four children of the testator who survived him.

We answer the first question with regard to which instruction is sought by saying that the respondent Helen McLaughlin shares equally with her sisters and her brother in two-thirds of the residue of the estate under the provision of the sixth paragraph of the will.

By the second paragraph of the will the testator devised 2) a certain dwelling house, barn and land to his wife and

further provided as follows: "I also give and bequeath to my beloved wife one third of all the rest, residue and remainder of my property, mention of which property is more specifically hereinafter made, . . . in the event of her remarriage after my decease I give to her the sum of five thousand dollars outright, instead of the one third herein bequeathed to her, together with the house and land above bequeathed to her." In the sixth paragraph the testator provides: "Sixth: All the rest, residue and remainder of my estate . . . I give devise and bequeath one third to my beloved wife and the remaining two-thirds to my children, the childrens' share however to be held in trust." Because of these two provisions for the widow, which are claimed to be repugnant, instruction is asked: "As to whether the bequest to Elizabeth McLaughlin, widow of said John McLaughlin deceased, contained in the sixth clause of said will is affected or modified by the condition in the second clause thereof, or whether the bequest to said Elizabeth McLaughlin is absolute."

In behalf of the widow the rule of construction is urged that when a later clause in a will is repugnant to a former provision, the later clause, being the last expression of the testator's intention, must prevail. The two provisions in question are inconsistent. Each in itself is explicit. the second clause one-third of the residue is given to the widow with a condition of defeasance in the event of her remarriage; in the sixth clause a gift of the same quantity is made without such condition. They each stand separate and distinct from the other. While we may conjecture that it is unlikely that the intention expressed in the second clause was forgotten or changed before the testator reached the sixth clause, there is no specific or general intent apparent in the will itself which will exclude that conclusion; and the same conjecture may be made with reference to any provision in a will which is plainly repugnant to an earlier provision. The rule of construction based upon the relative position of inconsistent clauses should not be applied

until an attempt has been made to reconcile such repugnant provisions and to give effect to each. In this matter, however, there is no construction which will uphold both these They cannot both express the testator's intention. The suggestion has been made that these two provisions be read together, but no assistance will be gained from that procedure, unless the provisions of the second clause be incorporated in the sixth and the court thus place a condition on the absolute gift which the testator has That would be an attempt to harmonize) failed to impose. the provisions of a conditional and an absolute devise by destroying the later absolute gift. From the lack of a clue, contained in the will, as to the real intention of the testator it is impossible to reconcile these repugnant provisions and the later must prevail. We therefore advise the parties that the gift of one-third of the residue to Elizabeth Mc-Laughlin is absolute.

The complainant further asks for instructions "as to the effect of the second paragraph of the fifth clause of said will providing for the sale of the testator's real estate, whether the sale contemplated by said paragraph may be made by private sale as well as by public auction, as to who is the proper person to make such sale and whether in making said sale special authorization from the court is necessary."

The second paragraph of the fifth clause is as follows: "The bulk of my property consisting of wood lots, timber lands and tillage lands in the states of Rhode Island, Connecticut and Massachusetts, I request that all same be sold as soon as conveniently may be after my decease at public auction and the proceeds therefrom become a part of my general estate out of which the legacies herein bequeathed may be paid if necessary." In the seventh paragraph of the will is the following provision: "Seventh: I authorize my said executors and trustees to sell both real and personal estate at private sale or at public auction, and to invest and reinvest said proceeds if in their judgment they deem it advisable." Giving effect, if possible, to each of these

provisions we are of the opinion that the "request" in the second paragraph of the fifth clause is directory merely as to the time and manner of the sale of said wood lots, timber and tillage lands, and that in the seventh clause power is given to the executor to sell said wood lots, timber and tillage lands either at private sale or at public acution as in their judgment shall appear advisable.

In making his will it was in the contemplation of the **(5)** testator that his wife and brother should act in the capacity of executors of the will, as well as trustees of the fund of twothirds of the residue for the benefit of the testator's children. Although in the seventh cause of this inartistically drawn will the "executors and trustees" are authorized to sell, we are justified in assuming that the scrivener and the testator had in mind the persons who were to sell rather than the particular capacity in which they acted. It is plain that the testator desired and expected that his real estate other than that specifically devised should be converted into money as soon as convenient after his death, and of the money comprising the residue one-third should be paid to the widow and twothirds retained by the widow and the brother in trust for the The sale of the real estate was to be made in furtherance of their duties as executors in settling the estate; the power to invest and reinvest was given to them as trustees to aid them in administering the trust for the benefit of the The offices of personal representative and trustee have now been separated. There is nothing in the will which indicates that the power to sell was given to the executors as individuals apart from their office. The complainant as administrator de bonis non c. t. a., under the provisions of Section 26, Chapter 312, General Laws, 1909, succeeded to the power of the executors to turn the real estate into money for the purpose of administering the estate. That section is as follows: "Section 26. Executors for the time being, or administrators with the will annexed, shall have the same power to sell, lease or mortgage, and make conveyance of real estate, as are given by will to the original executors,

R. I.]

unless such powers be expressly given to such executors as individuals apart from such office, or provision to the contrary be made in the will."

As the power to sell the real and personal estate is specifically given to the executors by the testator, the complainant requires no special authorization for sale from the court.

We reply to the third request for instructions: that the complainant is the proper person to make sale of the testator's real estate, that such sale requires no special authorization from the court, and may be by private sale or public auction as the complainant deems advisable.

The parties on July 3, 1922, may present a form of decree in accordance with this opinion.

Huddy, Emerson & Moulton, for conplainant.

Huddy, Emerson & Moulton, for James and Elizabeth McLaughlin.

Cooney & Cooney for Helen McLaughlin.

Tillinghast & Collins, Harold E. Staples, for guardian ad litem of John, Maria & Elizabeth McLaughlin, minors.

STATE OF RHODE ISLAND vs. FRANK W. COY REAL ESTATE COMPANY et al.

JUNE 22, 1922.

PRESENT: Sweetland, C. J., Vincent, Stearns, and Rathbun, JJ.

(1) Common Law Dedication. 'Estoppel in Pais.

A common law dedication does not operate as a grant but by way of estoppel in pais. The dedication is regarded not as transferring a right but as operating to preclude the owner from resuming his right of private property or any use inconsistent with the public use. By such a dedication the fee does not pass to the public but only an easement. The intention of the owner is to be ascertained from his acts and declarations, and while his right to make a dedication subject to a condition subsequent is unquestioned, the law does not favor conditions subsequent.

(2) State Roads. Dedication.

The State was engaged in reconstructing a road as part of the state highway system. It was desirable that the highway be built through land of re-

spondent. The town and respondent having failed to come to an agreement in regard to terms after a conference between the town committee, the agent of respondent and the engineer supervising the construction of the road for the State an agreement was entered into whereby respondent agreed to convey land to the town for the purpose of the highway and the town agreed to build certain walls and to abandon the old highway the land in which was to revert to respondent. The walls were to be built before the deed was executed. The agreement was signed by respondent, was "accepted" and signed by the committee for the town and was also signed by the engineer. The latter had no authority to bind the State. Work was begun and a highway built through respondent's land which was opened to travel but respondent claiming that the agreement had not been kept attempted to prevent travel over the road and the State secured an injunction:

Held, that the State was no party to the agreement and whatever was to be done thereunder was to be done by the town:—

Held, further, that from the facts established by the evidence there was a valid and unconditional dedication made by respondent who intended that the public should at once acquire an easement over the new way in which respondent still retained the fee, as well as acquiring the fee in the abandoned highway.

BILL IN EQUITY. Heard on appeal of complainant and sustained.

STEARNS, J. This cause is in this court on an appeal by complainant from a final decree of the Superior Court dismissing the bill of complaint. The subject matter of the present proceedings has now been for several years past the basis of much and varied litigation in law and in equity between the parties. The original bill of complaint was considered by this court, as appears and as reported under the same title in 103 Atl. 484, and 107 Atl. 82. complaint having been amended as directed by this court the cause was heard by a justice of the Superior Court on bill, answer, replication and oral testimony, on issues of fact. The prayer of the bill for a permanent injunction restraining respondents from obstructing and interfering with public travel upon the road known as the "Shore Road" in Westerly was denied and the bill was dismissed. The temporary injunction previously granted however was continued by the decree until the final determination of the cause.

The question is, was the evidence sufficient to establish the claim of the state that the public had a right to use the part of the "Shore Road" in question by reason of a dedication by respondents or by reason of an estoppel in pais? The vital facts are not seriously controverted, and the question is, what is the legal effect of the evidence?

In 1912 the state was engaged in reconstructing the "Shore Road" as a part of the state highway system. In September the work had progressed to a point on the highway adjacent to land of the respondents and it was manifestly desirable and advantageous to the public, the town and the respondents that the highway should be straightened at this point by building the highway for a certain distance through farm land of the respondents. The town and respondents had failed to come to an agreement in regard to the terms whereby the desired change should be made, but after a conference between the town committee, the agent of the respondents and a Mr. Bristow, the engineer supervising the construction of the "Shore Road," the following agreement was prepared by the attorney of the respondents:

"WESTERLY, R. I.,

September 16th, 1912.

In order to help along the proposed improvement of the Shore Road by the State of Rhode Island and the town of Westerly, in said State, the Frank W. Coy Real Estate Company, acting herein by Frank W. Coy, its President fully authorized, and Katherine R. Welch, hereby agree, to and with said State and town, that they will execute a deed to said town, and deliver the same to its agents, conveying a strip of land, needed for said improvements, where said highway goes through our land, according to the new survey, not to exceed fifty feet in width, subject to the following conditions to be inserted in said deed,

we are to have permission to maintain certain pipes across said street, which we propose to put in and lay before the proposed road is built;

culverts and catch basins to be built in said road where necessary to take care of surface water;

proper approaches to be made from the road to the adjoining fields, barns and buildings on said farm, where necessary;

we are not to relinquish any rights for damages that may accrue on account of the collection of, and the flowage of water on our land, from said road.

Before the execution of said deed the town is to make a stone wall along the new south line of said Road west of the farm house taking the stones from the present wall and relaying them along the new south line of the proposed Road where a change is made and said walls are to be relaid in as good condition as they are now in. Also build walls on each side of the proposed new road east of the barn and they shall be built as follows: the soil where the walls are to be set shall be removed to the depth of at least six inches; the walls shall be two feet thick at the bottom, and one foot thick at the top, and shall be four feet high, and shall be lined up on top, and the walls shall be thoroughly chocked throughout

A bank wall shall be built opposite the farm house not less than four feet high, and as much higher as the town's agents shall think proper and the slope from the top of this bank wall to the edge of the macadam road bed shall be covered with loam, at least six inches deep, so grass seed may be sown thereon.

Gates or bars are to be placed in said proposed new walls in as many places as they appear in the old walls, at such places as may be designated by us.

The Town is to abandon the old highway and accept the new layout, and the land in the abandoned highway to revert to us."

This agreement was signed by the respondents, was "accepted" and signed by the committee for the town and also was signed by Mr. Bristow. Mr. Bristow had no authority to bind the State and made no promises or representations to respondents. There is some evidence to the effect that Bristow told one member of the town committee that the north wall along a part of the new way would be constructed by the State Board, but this was not communicated to respondents and the signature of Bristow was added to the document with the apparent idea that some indefinable claim might be made upon the State. Work was at once begun on the new way through respondents' land, and a bituminous macadam highway was built thereon at a cost of about \$8,000, which was completed in May, 1913, and opened to public travel in June. The town failed in some respects to carry out the agreement and the north wall along the highway has never been built. The respondents protested to the town for its failure to fulfill its obligation and shortly after the road was opened to travel attempted to prevent the use of the road by the public. Not succeeding in this attempt a civil action was begun and prosecuted against the town for alleged trespass. This action having been decided adversely to the respondents, they later sued the town for breach of the contract. The decision in this case was adverse to respondents in the Superior Court and the case is now pending in this court on bill of exceptions. Having failed thus far in the suits against the town, respondents attempted to prevent travel on the road and a temporary injunction was issued on the prayer of complainant.

The trial justice in his rescript held that the immediate construction of the road was intended by respondents, as the requirements of respondents could not be fulfilled until the road was built; that, although the State was not contractually bound by the agreement, the State Board, although it had no knowledge of the agreement, nevertheless was chargeable with knowledge of the agreement by reason

of the knowledge of its engineer Bristow and that the dedication of the road for public use was made subject to conditions subsequent, namely, the performance by the town of the things it had agreed to do; that the argument of the State that nonperformance of the conditions might warrant Coy in refusing to deliver a deed, and that he thus might retain title, but that the land had permanently become a public highway was not warranted by the facts.

We think the conclusion of the trial justice was erroneous

and that the dedication made to the public was absolute and complete. In 8 R. C. L. § § 31, 32, p. 906, the law is thus concisely stated: "A common law dedication does not operate (1) as a grant, but by way of estoppel in pais. This doctrine is adopted from necessity, for lack of a grantee capable of The dedication, therefore, is regarded not as transferring a right, but as operating to preclude the owner from resuming his right of private property, or indeed any use inconsistent with the public use. The ground of estoppel is that to reclaim the land would be a violation of good faith to the public and to those who have acquired private property with a view to the enjoyment of the use contemplated by the dedication." A dedication is established by proof of the owner's intention to dedicate the land and the acceptance of the dedication by the public by the use of the land. As stated in Union Co. v. Peckham. 16 R. I. 64: "If the act of dedication be unequivocal, it may take place immediately." See also Daniels v. Almy, 18 R. I. 244. By such a dedication the fee does not pass to the public but only an easement. So far as the owner of the land is concerned, it is sufficient if his intention to set apart a portion of his land for the public use is clear. The intention of the owner is to be ascertained from his acts and his declarations, as no particular mode of making a dedication is prescribed by the common law. His right to make a dedication subject to a condition subsequent is unquestioned. But the law does not favor conditions subsequent even when expressed in an instrument under seal, as by a deed. Greene v.

R. I.]

O'Connor, 18 R. I. 56; Ecroyd v. Coggeshall, 21 R. I. 1: Field v. City of Providence, 17 R. I. 803. The State was not a party to the agreement nor was it bound to do anything required by the respondents. Whatever was to be done under the agreement was to be done by the town. After the town had built the new walls, respondents agreed to execute a deed to the town of that strip of land where the (2) new highway was constructed through their land. town was to abandon the old highway and the land therein was to revert to respondents. Having thus made provision to secure the fee in the old highway from the town, we think respondents intended that the public should at once acquire an easement over the new way, as in addition to their claims against the town they still retained the fee of the new location. Even if the State is chargeable with the knowledge of the engineer, although we do not pass on this point, it seems hardly probable that the State would proceed to construct this piece of highway unless it had some assurance that it would be permitted to use it after it was constructed. The State had no power to compel the town to perform its agreement and yet, on the construction of the agreement as made by the trial justice, the public might at any time be deprived of the use of the highway by the failure of the town to perform satisfactorily any of the numerous requirements of the agreement. Such a result in our judgment never was contemplated by any of the parties. The conduct of respondents in bringing the various actions against the town would seem to confirm our conclusion that there was a valid and unconditional dedication made by respondents. Such being the case, the permanent injunction asked for by the State should have been granted.

The appeal of complainant is sustained; the decree appealed from is reversed. On July 3, 1922, the parties may present a form of decree in accordance with this opinion.

Herbert A. Rice, for complainant.

John J. Dunn, Waterman & Greenlaw, for defendant.

Apostolos B. Cascambas vs. Frank H. Swan et al. Receivers of R. I. Co.

JUNE 27, 1922.

PRESENT: Sweetland, C. J., Vincent, Stearns, Rathbun, and Sweeney, JJ.

(1) Negligence. Carriers. Last Clear Chance.

Where the evidence was conflicting on the question whether plaintiff suddenly turned his car in front of the electric car when the latter was so near that it was impossible to stop the electric car in time to avoid the accident or whether plaintiff was driving between the tracks, and vainly endeavoring to drive off the tracks when the electric car was a sufficient distance away to enable the motorman after he should have observed plaintiff's predicament to stop his car, it was a question for the jury whether the motorman had the last clear chance to avoid the accident.

(2) Negligence. Carriers. Last Clear Chance.

Charge in a personal injury case arising out of a collision between the plaintiff's car and an electric car that even if plaintiff were negligent, "if you find that the motorman by the exercise of reasonable diligence after he observed the dangerous position (of plaintiff) could have stopped his car and avoided the collision, then you would be justified in holding the company liable" was proper, the court having previously instructed the jury that the motorman had the right to assume that if a man is running along on the track he will turn off under ordinary circumstances, and it would only be in the event that the motorman discovered that the driver had caught his wheel and was trying to get out and the motorman made that discovery in time so he could have stopped his car and avoided the accident that there would have been any duty on his part to stop his car.

TRESPASS ON THE CASE for negligence. Heard on exceptions of defendant and overruled.

RATHBUN, J. This is an action of trespass on the case for negligence. The trial in the Superior Court resulted in a verdict for the plaintiff for \$874.20. The defendant made a motion for a new trial. The trial court refused to disturb the findings of the jury on the question of liability but found that the amount of damages awarded was not supported by the evidence and granted a new trial unless the plaintiff should remit \$50 of the damages awarded. The plaintiff filed a remittitur for \$50.

The case is before this court on the defendants' exceptions, as follows: to the refusal to grant a new trial without condition; to the refusal to direct a verdict for the defendant, and to a certain instruction to the jury.

The plaintiff is seeking to recover for damages caused to his Ford truck and to merchandise, with which the truck was loaded, by a collision between said truck and a street car operated by the defendants. The accident occurred on Quidnick street in the town of West Warwick. Quidnick street at the place of collision runs in a northerly and southerly course. The street car track is located on the westerly side of the street. The street car at the time of the accident was proceeding in a northerly direction and the truck in a southerly direction. It is clear that the chauffeur in charge of the truck was, a short time before the accident, proceeding with the right hand wheels of the truck running in a gulley located between and parallel to the rails of the car track. The plaintiff contends that his chauffeur just before the collision was compelled to turn the truck partially upon the car track to avoid hitting an automobile which was proceeding in the opposite direction; that it was very difficult for the chauffeur to extricate the right hand wheels of the truck from said gulley; that the collision occurred either before he succeeded in driving off the car track or before the truck was away from the track a sufficient distance to avoid the overhang of the car, and that by the exercise of due care after seeing the chauffeur's plight the motorman could have avoided the accident.

The defendants contend that the plaintiff's chauffeur suddenly, and without warning, drove upon the track and that the motorman was unable to stop the car before it collided with the truck.

The testimony was conflicting on the question whether (1) the plaintiff's chauffeur suddenly turned in front of the electric car when the car was so near that it was impossible for the motorman to stop the car in time to avoid the accident or whether the plaintiff was driving with the right

hand wheels in the gulley and vainly endeavoring to drive out of the gulley and off the car track when the electric car was a sufficient distance away to enable the motorman after he should have observed the chauffeur's predicament to avoid the accident by stopping the car.

We think that the evidence warrants a finding that the chauffeur was plainly endeavoring to drive out of the gulley when the car was a sufficient distance away to enable the motorman had he been in the exercise of due care to avoid the accident. The testimony being conflicting it was a question for the jury whether the motorman had the last clear chance to avoid the accident.

The exception to the refusal to direct a verdict for the defendant is overruled.

The defendants' counsel excepts as follows to the charge to the jury. "I take exception to that part of the Court's charge stating that the doctrine of the last clear chance applies where the defendant, after seeing the predicament of the plaintiff, could have by the exercise of reasonable care stopped the car, the doctrine of the last clear chance applying also to the plaintiff and the Court having failed to charge that the plaintiff could have stopped in time to avoid the collision by the exercise of due care."

The trial justice charged the jury relative to the rule of the last clear chance, as follows: "But on this phase of the case if you find that the plaintiff himself was not negligent, or even if you find that he was negligent and that the motorman by the exercise of reasonable diligence after he observed the dangerous position of this man Matthews could have stopped his car and avoided the collision, then you would be justified in holding the company liable."

We understand from the argument of defendants' counsel that he contends that the language of the court above quoted should have been supplemented by a statement to the effect that if the negligence of the plaintiff's chauffeur continued until the time of the accident the plaintiff can not recover. There was no error in the charge as given.

In Underwood v. Old Colony St. Ry. Co., 33 R. I., at 325, this court said: "If the defendant means by this exception, that in case the deceased was guilty of negligence in driving upon its track and while on the track was still careless in failing to look towards the approaching car, although the motorman saw him in his place of danger and saw that the deceased was ignorant of that danger and was taking no steps on his part to avoid it, and the motorman also knew that unless some measures were taken to check the speed of the car the deceased would be injured, yet it was not the motorman's duty to check the speed of the car because the deceased was still careless, we say that such is not the law . . . "It would be the motorman's duty of this state." to take such measures as he reasonably could to check the speed of the car and to avert the accident. If he failed in that duty, such failure would become the proximate and efficient cause of the injury and the defendant would be liable."

The court had previously instructed the jury as follows: "He had a right to assume that if a man is running along on the track he will turn off under ordinary circumstances and it would only be in the event that the motorman discovered that this driver had caught his wheel in the gulley and was trying to get out and the motorman made that discovery in time so he could have stopped his car and avoided the collision, that there would have been any duty on his part to stop his car and keep from hitting the automobile."

The defendant has no valid reason for complaining of the charge relative to the last clear chance.

On the question of liability the verdict has the approval of the trial court and we find no reason for distubing the verdict as reduced by the remittitur.

All of the defendants' exceptions are overruled and the case is remitted to the Superior Court with direction to enter judgment on the verdict as reduced by the remittitur.

Sheffield & Harvey, for plaintiff.

Clifford Whipple, Earl A. Sweeney, for defendant.

BEHREND T. FISCHER et al. vs. CHARLOTTE F. SCOTT. MARY E. VAN AUSDALL et al. FOR AN OPINION.

JUNE 27, 1922.

PRESENT: Sweetland, C. J., Vincent, Stearns, Rathbun, and Sweeney, JJ.

(1) Probate Law. Estate in Remainder. "Real Estate."

The clear intention of Sec. 7, cap. 1787, Pub. Laws, 1919, providing that whenever an intestate dies without issue leaving a husband or wife surviving, "the real estate . . . shall descend and pass to the husband or wife for his or her natural life. The probate court . . . may also in its discretion, if there be no issue as aforesaid, . . . allow and set off to the widow or husband in fee real estate of the decedent . . . to an amount not exceeding five thousand dollars in value," was to give to the surviving spouse an interest in all of the real estate of whatsoever nature of the deceased spouse.

(2) Probate Law. Estate in Remainder. "Real Estate."

A vested interest in remainder expectant upon a life estate is "real estate" within the meaning of Pub. Laws, 1919, cap. 1787, § 7.

PROBATE APPEAL and also a special case stated for the opinion of the court. Exception of appellants in first case overruled.

RATHBUN, J. The first case is before us on exception to the decision of a justice of the Superior Court affirming a decree of the Municipal Court of the City of Providence.

Said decree allowed and set off in fee to Charlotte F. Scott, widow of Earl W. Scott, an undivided one-half interest in certain real estate in which her husband in his lifetime had a vested interest in one-half thereof in remainder.

The appellants appealed from said decree to the Superior Court. The parties waived a jury trial and agreed that the facts are as follows: "that said Earl W. Scott died on February 21, 1920, intestate and without issue, leaving the petitioner, his wife, surviving, and that said Earl W. Scott was entitled to a vested remainder in fee simple in an undivided one-half interest in said real estate, said remainder

being expectant upon the life estate of Mary C. Toye, and that said Mary C. Toye died prior to the filing of said petition, and that none of said real estate is required for the payment of debts of said Earl W. Scott, and that said Earl W. Scott owned at the time of his death real and personal property of the value of less than Two Hundred Dollars (\$200.00) except his said interest in said real estate, and that said Charlotte F. Scott owns property of the value of less than Five Hundred Dollars (\$500.00) and is obliged to support herself by her own labor, and that the entire value of said undivided one-half interest in said real estate does not at the present time exceed Five Thousand Dollars (\$5,000.00)."

The appellee's husband, Earl W. Scott, was never seized of said real estate as he deceased before Mary C. Toye, the life tenant. The question arises whether a vested interest in remainder expectant upon a life estate is "real estate" within the meaning of Public Laws, 1919, Chapter 1787, Section 7, the statute by authority of which said decree was entered, which provides that: "Whenever the intestate dies without issue and leaves a husband or wife surviving, the real estate of the intestate shall descend and pass to the husband or wife for his or her natural life. The probate court having jurisdiction of the estate of the intestate, if a resident of this state, or the probate court of any city or town in which the real estate of the intestate is situated if not a resident of this state, may also, in its discretion if there be no issue as aforesaid, upon petition filed within one year after the decease, allow and set off to the widow or husband in fee real estate of the decedent situated in this state to an amount not exceeding five thousand dollars in value."

The same questions are raised in the second case, the parties having concurred in stating such questions in the form of a special case for the opinion of this court, in accordance with the provisions of Gen. Laws, 1909, Chap. 289, § 20.

Section 9, Chapter 32, Gen. Laws, 1909, provides: "The word 'land' or 'lands,' and the words 'real estate,' may be construed to include lands, tenements and hereditaments, and rights thereto and interests therein." A vested remainder in fee is an interest in real estate. Section 1 of said chapter provides: "In the construction of statutes the provisions of this chapter shall be observed, unless the observance of them would lead to a construction inconsistent with the manifest intent of the general assembly, or be repugnant to some other part of the same statute." A construction construing the words "real estate" in Section 7 of said Chapter 1787, to include a vested interest in remainder, would not, in our opinion, be "a construction inconsistent with the manifest intent of the general assembly, or be repugnant to some other part of the same statute."

At the hearing before us it was contended on behalf of the appellant that inasmuch as neither dower nor curtesy attached to an estate unless the deceased spouse was seized thereof during the intermarriage it was not the intention of the legislature as expressed in said Section 7 to give to the surviving spouse an interest in a vested estate in remainder. The clear intention of said Section 7 was, in the event of the decease of one spouse intestate and without issue, to give to the surviving spouse a larger interest in the estate of the intestate than was given by the statutes providing for dower and curtesy and by Gen. Laws, 1909, Chap. 316, of which said Section 7 is an amendment. Said chapter gives to the surviving spouse a larger interest also in the personal estate. Said chapter even permits the probate court in its discretion to allow and set off in fee to the surviving spouse ancestral estate of the deceased spouse to an amount not exceeding five thousand dollars in value. What is a vested It is certainly interest in remainder if it is not real estate? not personalty. It is an interest which may be disposed of by will. Sec. 23, Chap. 252, Gen. Laws, 1909; Secs. 1 and 2, Chap. 254, Gen. Laws, 1909; Loring v. Arnold, 15 R. I. 428

We do not think the words "real estate of the decedent" can fairly be construed to mean "real estate of which the deceased was seized in possession during the intermarriage." We are of the opinion that the legislature in passing said Chapter 1787 intended to give to the surviving spouse, when the decedent died without issue, an interest in all of the real estate of whatsoever nature of the deceased spouse; that said real estate in remainder on the decease of said Earl W. Scott passed by virtue of said Section 7 to his widow, Charlotte F. Scott, for life and that said Municipal Court had authority by virtue of Section 7 of said Chapter 1787 to allow and set off to her in fee said remainder as it did not exceed five thousand dollars in value, and the parties to the proceedings seeking an opinion are advised accordingly.

The exception of the appellants in the first case is overruled and the case is remitted to the Superior Court for further proceedings.

Quinn & Kernan, for Fischer et al.

Claude R. Branch, Kenneth J. Tanner, Edwards & Angell, for Charlotte F. Scott.

JOHN M. GIBLIN vs. DUDLEY HARDWARE CO.

JUNE 27, 1922.

PRESENT: Sweetland, C. J., Vincent, Stearns, Rathbun, and Sweeney, JJ.

(1) Negligence. Registration of Motor Vehicles. Presumption of Ownership.
Where a motor vehicle has been registered under Pub. Laws, 1909, cap 454, and a distinguishing number assigned to it, and no notice of the owner's transfer of interest has been filed with the State Board of Public Roads, in an action brought to recover damages for injuries arising out of a collision between said vehicle and a car of plaintiff, the plaintiff can rely upon the presumption that the requirements of the law have been complied with and that the defendant was the owner of the vehicle at the time of the accident.

(2) Negligence. Master and Servant. Presumption of Servant's Employment.

Burden of Proof.

Where a plaintiff has proved that a motor vehicle was owned by defendant at the time of an accident, it is a reasonable presumption that it was being used in defendant's business at that time. This presumption, however, is rebuttable and may be met and overcome by the evidence of defendant.

NEGLIGENCE. Heard on exceptions of defendant and overruled.

Sweeney, J. This is an action of trespass on the case for negligence. The declaration alleges that while the plaintiff was operating a taxicab a servant of the defendant corporation so negligently operated its motor delivery truck that it ran into the taxicab the plaintiff was operating and severely injured him.

At the close of the plaintiff's testimony, the defendant rested its case without introducing any testimony and moved for a direction of a verdict in its favor. After argument the court denied this motion and the defendant's exception was noted. The case was then submitted to the jury after argument by the attorneys for the defendant and the plaintiff and the charge of the court and the jury returned a verdict for the plaintiff. The defendant then duly brought the case to this court by its bill of exceptions without making a motion for a new trial. Several exceptions are stated in the bill but the only one now claimed is to the denial of the defendant's motion for a direction of a verdict.

The plaintiff proved that the motor truck was registered and owned by the defendant corporation. Defendant's motion for a direction of a verdict was based upon the claim that the plaintiff had not shown by competent evidence that the driver of the truck, at the time of the accident, was the servant of the defendant and that the plaintiff should have introduced testimony tending to show that the driver of the truck, at the time of the accident, was the servant of the defendant and acting within the scope of his employment.

The trial justice charged the jury that if they were satisfied that the auto truck "was the property of the defendant, then that fact would warrant the further presumption that at the time of the accident it was being operated on the highway by the servant of the defendant corporation, and that that servant was in the discharge of his duties as such servant, and acting within the scope of his authority. All of these things you would be warranted in assuming to be facts from the testimony as it appears before you at the present time."

Chapter 454, Public Laws, 1909, requires every owner of a motor vehicle, before using it upon the public highways, to file with the State Board of Public Roads a statement under oath of his name with a brief description of the motor vehicle owned by him and, upon the payment of the proper fee for registration, the Board will register such motor vehicle and assign to it a distinguishing number and issue to the owner a certificate of registration for such motor vehicle. This distinguishing number must be placed upon the vehicle so that it can be seen and said certificate must be carried upon such motor vehicle when the vehicle is operated upon the public highways. Said chapter also provides that if the owner of a motor vehicle so registered shall transfer his interest therein to some other person such registration shall expire immediately upon the transfer of such ownership, and that when he transfers his interest in such motor vehicle to some other person he shall also file with the said Board a written notice containing the name and place of residence of the new owner and the date of such transfer. The law also provides that no person shall operate a motor vehicle upon the public highways of the state unless it shall be duly registered.

An important reason for requiring motor vehicles to be registered and the distinguishing number assigned to the vehicle displayed upon it is to give a person injured by the operation of such vehicle an opportunity of identifying the owner thereof. Under the law above referred to a motor

vehicle cannot be lawfully operated upon the public high-

Amrhine, 98 Md. 406.

ways unless duly registered by the owner thereof. The defendant corporation had the motor truck duly registered and the distinguishing number assigned thereto displayed upon it at the time of the accident. No notice of defendant's transfer of interest in the motor vehicle had been filed with said Board by the defendant; and under these facts the plaintiff could rely upon the presumption that the requirements of the law had been complied with and that the defendant was the owner of the motor vehicle at the time of the accident. The plaintiff having proved that the motor vehicle was owned by the defendant at the time of the accident, it was a reasonable presumption that it was (2) being used in the defendant's business at that time. presumption, however, is a rebuttable one and may be met and overcome by the evidence of the defendant. Berger v. Watjen, 106 Atl. (R. I.) 740; Bogorad v. Dix, 176 App. Div. (N. Y.) 774; McCann v. Davison, 145 App. Div. (N. Y.) 522; Long v. Nute, 123 Mo. App. 204; Langworthy v. Owens, 116 Minn. 342; Wood v. Indianapolis Abattoir Co., 178 Ky. 188; Patterson v. Milligan, 12 Ala, 324; Vonderhorst Br. Co. v.

Substantially the same question raised in this case was before this court in the case of Burns et al. v. Brightman et al., 44 R. I. 316. The trial justice charged the jury that, as the defendants had admitted that the automobile involved in the accident was theirs, if no other evidence was produced this was a prima facie case which would warrant the jury in drawing the conclusion that the person in charge of the machine was engaged in the employment of the defendants; but as the defendants had testified that the driver of the machine was not their servant and not in their employ this issue was to be decided upon consideration of all of the testimony. This court said, in overruling an exception to this portion of the charge, "The presumption referred to by the trial judge which made a prima facie case, meant simply that plaintiffs had introduced sufficient

evidence to require defendants to present their case. This having been done, the jury was instructed to decide the issue upon all of the facts in evidence."

In the case of *Benn* v. *Forest*, 213 Fed. Rep. 763, in the Circuit Court of Appeals the rule of proof was stated to be, "If the chauffeur was not running the car at the time of the accident as the servant of the defendant the fact was peculiarly within the defendant's knowledge and the burden is on him to establish it."

The general rule applying to this question is stated in 10 R. C. L. Evidence, Sec. 45, as follows: "The term 'burden of proof' has two distinct meanings. By the one is meant the duty of establishing the truth of a given proposition or issue by such a quantum of evidence as the law demands in the case in which the issue arises; by the other is meant the duty of producing evidence at the beginning or at any subsequent stage of the trial, in order to make or meet a prima facie case. Generally speaking, the burden of proof, in the sense of the duty of producing evidence, passes from party to party as the case progresses, while the burden of proof, meaning the obligation to establish the truth of the claim by a preponderance of evidence, rests throughout upon the party asserting the affirmative of the issue, and unless he meets this obligation upon the whole case he fails. burden of proof never shifts during the course of a trial, but remains with him to the end. . . . Slight evidence is sufficient to shift the burden of proof of a fact from the plaintiff to the defendant, where the knowledge of such fact is peculiarly within the knowledge of the defendant, and which, in the nature of things, it would be difficult for the plaintiff to prove."

The defendant has cited several cases from other states in support of its contention but this court is of the opinion that the rule announced in *Burns et al.* v. *Brightman et al.*, supra, and sustained here is more in accord with better reason and the weight of authority.

All of the defendant's exceptions are overruled and the case is remitted to the Superior Court with direction to enter judgment for the plaintiff upon the verdict.

Alfred G. Chaffee, John A. Bennett, for plaintiff.
Green, Hinckley & Allen, Abbott Phillips, Clifford A.
Kingsley, for defendant.

STATE OF RHODE ISLAND vs. JOHN WHITFORD.

JUNE 29, 1922.

PRESENT: Sweetland, C. J., Vincent, Stearns, Rathbun, and Sweeney, JJ.

(1) Criminal Law. Lewd, Wanton and Lascivious Person.

Request to charge that "one act of sexual intercourse was not sufficient to warrant a conviction on the charge of being a lewd, wanton and lascivious person," was properly refused where the evidence showed that defendant, a mature colored man had intercourse with a little girl under revolting conditions and was a frequenter of houses of ill fame; was guilty of vulgar statements and had lived in the same tenement with two white girls until they were sentenced to a reformatory; all the evidence warranting a finding that defendant was a lewd, wanton and lascivious person in speech and behavior, and the request taken literally amounting to a request for the direction of a verdict in defendant's favor.

CRIMINAL complaint. Heard on exceptions of defendant and overruled.

RATHBUN, J. This is a criminal complaint charging the defendant with being "a lewd, wanton and lascivious person in speech and behavior," in violation of Section 25, Chapter 347, Gen. Laws, 1909. The defendant, having been adjudged guilty by the District Court of the Third Judicial District, appealed to the Superior Court. The trial in the Superior Court resulted in a verdict of guilty. The case is before this court on the defendant's exceptions, as follows: to the refusal of the trial court to direct a verdict for the defendant; to the admission of testimony; to the refusal to charge as requested, and to the denial of the defendant's motion for a new trial.

The evidence shows that Mrs. Anna Paine, a colored woman, induced Bertha Buck, a white girl, who testified she was sixteen years of age but who, according to the record. appears to be a little girl, to leave her place of employment and live in the home of Mrs. Paine. The defendant, a colored man thirty-eight years of age, called at the house of Mrs. Paine and saw the girl there. From the testimony of Bertha Buck it is apparent that he held a conversation with Mrs. Paine relative to inducing Bertha to have intercourse with him. Bertha testified that as soon as he left the house Mrs. Paine commenced advising and attempting to persuade her to have intercourse with the defendant: that two days later the defendant again called at the house of Mrs. Paine; that she again advised and requested Bertha to submit herself to the defendant; that the defendant joined in the request and promised to give her a present on the following day. There is testimony that the girl did not wish to comply with the wishes of Mrs. Paine and the defendant. The girl testified that she finally consented and went into an adjoining room and had intercourse with the defendant. A few days later the defendant was arrested in the same house. The defendant admitted to the police that he had intercourse with the girl and stated that she was "good hitting." There was testimony that the defendant lived with two white girls for a time until they were arrested and sentenced to the State Workhouse and House of Correction. The defendant admitted that he lived in the same tenement with said girls. There was testimony that the defendant habitually resorted to houses of ill-fame and resorts where intoxicating liquors could be obtained; that he was frequently intoxicated and did very little work.

The defendant's counsel moved for a direction of a verdict and argued that there was no evidence against the defendant except evidence of a single act of fornication. It was not error to deny the motion. In addition to the revolting picture of a colored man and woman, each of mature age, together attempting to persuade and finally by the promise of a gift inducing a little girl to submit herself to the defendant, there was strong uncontradicted evidence which tended to show that the defendant was in speech and behavior the kind of a person which the complaint charged him with being.

The defendant excepted to the refusal to charge, as (1) "The fact that this defendant committed one act of sexual intercourse with Bertha Buck is not sufficient to warrant a conviction on the charge of being a lewd, wanton and lascivious person." The court charged in substance that a single act of fornication in secret by persons of mature mind did not cause either of the parties to be lewd, wanton, and lascivious. The undisputed testimony was not confined to showing an act of illicit intercourse which was between a man of mature years and a little girl under the circumstances and conditions above related. The defendant admitted making vulgar statements in the police station relative to the little girl. He admitted living in the same tenement with two white girls until they were taken from the tenement and sentenced to the State Workhouse and House of Correction. He did not deny that he habitually frequented houses of ill-fame. The defendant took advantage of a little girl under circumstances above related and had intercourse with her. This fact and the facts which were undisputed are sufficient to warrant the jury in believing that the defendant was a lewd, wanton and lascivious person in speech and behavior. The defendant's request to charge would have had a tendency to mislead the jury. Taken literally it amounted to a request for a direction of a The court had already charged the jury correctly concerning the question involved in the defendant's request. The denial of defendant's request to charge was not error.

We find no merit in the other exceptions to the refusal to charge. The exception to the admission of testimony is without merit.

All of the defendant's exceptions are overruled and the case is remitted to the Superior Court for sentence.

Colin Mac R. Makepeace, 3d Asst. Attorney General, for State.

Michael J. Turano, Clarence E. Roche, for defendant.

Frances Lucey, p. a. vs. John F. Allen.

JOHN J. PRENDERGAST vs. SAME.

HELEN M. PRENDERGAST vs. SAME.

JUNE 29, 1922.

PRESENT: Sweetland, C. J., Vincent, Stearns, Rathbun, and Sweeney, JJ.

- (1) Evidence. Exclusion not Error, When.
- The exclusion of a proper hypothetical question does not constitute reversible error, when the purpose of the question was to show the negligence of a party and the jury found him to have been negligent.
- (2) Bill of Exceptions. Stating Exceptions.
- An exception "to the ruling of the court refusing to grant plaintiff's request to charge numbered 1, 2 and 3, page 265 of the transcript" offends against the provisions of the statute requiring a party to state in his bill the exceptions relied upon, "separately and clearly."
- (3) Negligence. "Family Automobile." Principal and Agent.
- In the case of a "family automobile" the owner is chargeable with the negligence of another member of the family who is driving, if the owner is a passenger and it is being used for a purpose in the accomplishment of which the owner is interested for in such circumstances the relation of principal and agent arises between the owner and the driver.
- (4) Negligence. Automobiles. Contributory Negligence. Guest of Driver.

 The negligence of the driver of an automobile cannot be imputed to a guest who was a passenger in the car and who was in no way guilty of contributory negligence.

Trespass on the Case for negligence. Heard on exceptions of plaintiffs. Exception of Frances Lucey sustained other exceptions overruled.

SWEETLAND, C. J. Each of the above entitled cases is an action of trespass on the case to recover damages for personal

injury and in the case of plaintiff Helen M. Prendergast also for injuries to an automobile. All of said injuries it is alleged were received in a collision between an automobile operated by the plaintiff John J. Prendergast and one operated by the defendant Allen, which collision it is alleged was caused by the negligence of the defendant Allen. The automobile operated by John J. Prendergast was owned by the plaintiff Helen M., wife of said John J.

These three cases were tried together before a justice of the Superior Court sitting with a jury and at the same time there was tried before said justice and jury the action of trespass on the case of Allen against John J. Prendergast to recover damages for injury to the automobile of Allen arising from said collision, which Allen alleges was brought about by the negligence of Prendergast. The trial resulted in a verdict for the defendant in each of said four cases. Each of the four plaintiffs duly filed a motion for new trial, all of which motions were denied by said justice. The plaintiff Allen has not sought to bring his action to this court for review. Each of the other three cases are before us upon the plaintiff's exception to the action of said justice denying the motion for new trial and upon exceptions to the rulings of said justice made in the course of the trial.

The collision in question occurred at or near the intersection of River and Division streets in Pawtucket. Just before the collision the defendant Allen was proceeding westerly on Division street and approaching River street, and John J. Prendergast, with whom was riding the plaintiffs, Frances Lucey and Helen M. Prendergast, was proceeding southerly on River street intending to turn easterly into Division street. On the northeast corner of Division and River streets there is a building situated on the lot line on each street, creating what has been called a "blind corner." The testimony of Allen is that as he approached River street he sounded his horn and that just before he reached River street Prendergast came out of River street, cut diagonally across said "blind corner" and struck Allen's

machine on its left front corner, while Allen was on his right side of Division street and before Allen had reached the easterly line of River street. The testimony of Prendergast is that as he approached Division street he sounded his horn and proceeded along the extreme right side of River street until he reached the northwest corner of River and Division streets; that he then with a broad turn to the left proceeded easterly to his right side of Division street; that after he had reached the center of Division street, leaving ample space for Allen to pass to the rear of the Prendergast car on Allen's right side of Division street, Allen negligently drove his car into the left side of the Prendergast car. The question of the negligence of each of these drivers was submitted to the jury with instructions by the court. Unquestionably in the collision the automobile of Allen was injured and Prendergast received personal injuries, the verdict of the jury indicates, therefore, that it found each driver guilty of negligence contributing to his own injury. This finding of the jury has been approved by said justice. After an examination of the evidence we find no sufficient reason to set aside the decision of said justice supporting the verdict in the case of Mr. Prendergast.

The plaintiff excepted to the ruling of said justice excluding a hypothetical question asked of the witness Davis with reference to the space within which the car of the defendant Allen could have been stopped in the circumstances immediately preceding the collision. In our opinion the justice might reasonably have permitted the question to be asked of the witness, who was clearly an expert in the use and operation of automobiles; but we think its exclusion should not be regarded as reversible error affecting the verdict, since the purpose of the question was to show the negligence of Allen, and the jury has found him to have been negligent.

The plaintiff has set out in his bill of exceptions the following: "2. Exception to the ruling of the Court refusing to grant plaintiff's request to charge numbered 1, 2, and 3, page 265 of the transcript." This is apparently

intended as the statement of exceptions to three rulings of

said justice refusing to charge as requested by the plaintiff. It offends against the provisions of the statute requiring a party prosecuting exceptions to state in his bill the exceptions relied upon "separately and clearly." Blake v. Atlantic National Bank, 33 R. I. 109; Dunn Worsted Mills v. Allendale Mills, 33 R. I. 115. If we overlooked that defect we would still be unable to consider the exceptions as no request of the plaintiffs to charge appears on page 265 nor elsewhere in the transcript. Neither have they been brought before us by petition to establish the truth of the exceptions. All of the exceptions in the case of

John J. Prendergast against Allen are overrruled.

In the cases of Mrs. Prendergast and Miss Lucey the question arises as to whether the negligence of Mr. Prendergast in operating the automobile should be imputed to them. Plaintiffs' counsel has referred us to a number of cases in which it has been held that a wife, riding in an automobile driven by her husband, is not chargeable with the husband's negligence in operating said automobile. when the wife does not exercise or attempt to exercise any control over such operation. If in this case the negligence of Mr. Prendergast is imputed to his wife, such determination would not be made because of the marital relation, but because she was the owner of the automobile, that it was being operated by the husband for the wife in furtherance of a purpose in which she was an interested party, and because from those circumstances the relation of principal and agent would arise between Mrs. Prendergast and her husband. It appears that at the time of the collision the Prendergasts were returning from a day's outing at Pearl (3) Lake near Franklin, Massachusetts; that for the purpose of carrying out this day of pleasure in which she was interested and took part she had furnished her automobile and being unable to operate it herself she had procured her husband to run it. In accordance with the rule of agency applicable with reference to a so-called "family automobile," the owner is undoubtedly chargeable with the negligence of another member of the family who is driving, if the owner is a passenger and it is being used for a purpose in the accomplishment of which the owner is interested. In such circumstances the relation of principal and agent arises between the owner and the member of the family driving the machine. The motion for new trial in the case of Mrs. Prendergast v. Allen was properly denied.

The plaintiff Frances Lucey was a young girl about fourteen years of age who was a guest of the Prendergasts upon this outing. The jury found that Mr. Allen was negligent; the negligence of Mr. Prendergast is not to be imputed to Miss Lucey, and no claim is made that she was in any way guilty of contributory negligence. The uncontradicted evidence is that she suffered injury which was not very severe but which would entitle her to compensation from the defendant Allen. It was error to deny her motion for new trial.

The exceptions of Mr. and Mrs. Prendergast are all overruled and the cases in which they are plaintiffs are ordered remitted to the Superior Court for the entry of judgment upon the verdict in each case.

The exception of Frances Lucey to the decision of said justice denying her motion for new trial is sustained. Her case is remitted to the Superior Court for a new trial.

E. Raymond Walsh, for plaintiffs.

Henry M. Boss, Jr., Curtis, Matteson, Boss & Letts, for defendant.

ORIETTE LOWE vs. CHARLES E. ANGELL et al.

JUNE 29, 1922.

PRESENT: Sweetland, C. J., Vincent, Stearns, Rathbun, and Sweeney, JJ.

(1) Gifts Causa Mortis. Finding of Facts by Justice without Jury.

Where a justice sitting without a jury found that a gift causa mortis was made to complainant of certain bank books and his findings were warranted by the evidence, such finding of facts will not be set aside under the well settled rule that a decision upon facts by a justice sitting without a jury will not be disturbed unless clearly wrong.

BILL IN EQUITY on facts set forth in opinion. Heard on appeal of respondent and dismissed.

RATHBUN, J. This is a bill in equity brought against Charles E. Angell and the Industrial Trust Company. The case is before this court on an appeal from a decree of the Superior Court. Said decree embodies findings made by the Presiding Justice of said court and decrees that the two deposits, described in the bill of complaint, standing in the name of Alpha B. Salisbury in the Industrial Trust Company on participation account belong to the complainant, Oriette Lowe, by gift causa mortis from Alpha B. Salisbury and directs said Industrial Trust Company and Charles E. Angell, administrator, to pay said deposits with the accrued interest thereon to said Oriette Lowe after the payment from said deposits of any debts or charges of the estate of said Alpha B. Salisbury legally chargeable against said fund.

It is admitted that said Salisbury signed orders (which are referred to by some of the witnesses as "checks") addressed to said Trust Company directing the payment of said deposits to the complainant. Each of the orders bears the date of February 3, 1921. The signature on each order was witnessed by Frank A. Wender, who, at the time of witnessing, was employed as a nurse for said Salisbury. either February 5th or 6th, 1921, Salisbury asked Wender, in the presence of the complainant, to witness his signature to said orders. Wender testified that he witnessed said signatures on February 6, 1921. The complainant testified that the signatures were witnessed on February 5, 1921; that while she was visiting Salisbury on said date he said, "While I think of it, open that drawer in my dresser. made out a check for my bank books payable to you with interest;" that she opened the drawer and passed the books

to him; that he handed them back to her and said, "I am going to give these to you;" that the signed orders dropped from the books when he opened them. She testified, "I put them back in the drawer. . . . Mr. Wender had brought in the broth Mr. Salisbury was going to have, and he wanted me to feed him. I put them back in the drawer and left them there that night. I had other bundles to carry when I left the house. . . . The next day, Sunday, I was there; he spoke about the books again. He said. 'I am going to give you these books because I want you to have them. You may need it. You are not working steady. You are down here spending a lot of your time, I want you to have them.' I took them home that night." Wender testified that he saw Salisbury give the bank books to the complainant and heard him say that he wanted her to have the money to use in taking care of herself.

On February 15, 1921, Salisbury was very ill and was taken from his house to the home of respondent Angell where he died within a few days. Just before Salisbury was taken from his house he asked the complainant to take the box, in which he was accustomed to keep his bank books and valuable papers, and take care of the box and contents.

Respondent Angell was appointed administrator of the estate of Salisbury and said box was delivered to Angell. Some time after his appointment Angell obtained from the complainant the orders and bank books in question and inventoried said deposits as a part of said Salisbury's estate.

The complainant contends that respondent Angell promised, when she delivered said bank books and orders to him, to have said deposits transferred to her on the books of said Trust Company. Her testimony to this effect was corroborated by the testimony of her brother. Respondent denies that he promised as the complainant contends but admits that before he obtained the orders he told her that he would take them "down and put it up to the court," and that he never brought the matter to the attention of the

Probate Court. He testified: "Did you take the bank books back? A. No; just the checks. I returned them to Miss Lowe and advised her to make them out as a bill and make the bill against the estate."

The respondent contends that Salisbury never made a gift of the bank books to the complainant; that Salisbury intended to give said bank books to her, not for her own use but to hold the deposits as a trust fund to be used by her in supporting his father in the event of said Salisbury's father surviving him; that said orders, although signed, were not delivered to the complainant until February 15, 1921; that on said date said bank books and orders were in Salisbury's possession in the box where he kept his papers and that the complainant obtained said bank books and orders on said date when she, at the request of said Salisbury, took said box and contents for safe keeping, and that on said 15th day of February Salisbury was, owing to disease, mentally incompetent to make a gift. Salisbury's father deceased February 6, 1921, in the lifetime of said Salisbury and it is suggested that even although a conditional gift in trust was consummated the trust failed with the condition. spondent Angell relies chiefly upon his own testimony and the testimony of his wife to support his contention that Salisbury never consummated the gift and only intended to make a conditional gift in trust. Angell testified that on February 6, 1921, the complainant made certain statements in the presence of himself and his wife. He testified as follows: "Well: I can't say just what time of day it was: after his father's body was removed we were in the kitchen that is right out of the sick room, Miss Lowe, my wife and myself, Mr. Wender had gone to the city for a change of clothing, and during the conversation Miss Lowe says: 'The other day Al called me in and said: 'Etta, our bank books are in that box or drawer,' I wouldn't say which, 'and I have made out a check payable to you. If anything happens to me I want you to promise that you will look out for my father as long as he lives' and she said: 'I promised.' She said: 'I don't know the amount of the checks or check; I haven't looked at them.'" Mrs. Angell's testimony as to what complainant said on February 6, 1921, while tending to some extent to corroborate her husband's testimony, contradicts his testimony on some of the important details. The complainant denied making the statements attributed to her. The evidence warrants a finding that at the time the gift is alleged to have been made Salisbury and the complainant were, and had been for several years, engaged to be married. He relied much upon her advice and she had assisted him in his business. Nothing has been suggested to indicate that a gift of the bank books by Salisbury to the complainant would be unnatural or unreasonable conduct on his part.

Whether Salisbury on either February 5th or 6th, 1921, intended to make an absolute gift of the bank books to the complainant and consummated his intention by delivering the bank books to her was a question of fact. This court has frequently said that the findings of fact made by a justice of the Superior Court sitting without a jury will not be disturbed unless such findings are clearly wrong. The trial justice found that on February 6, 1921, said Salisbury made a gift causa mortis to the complainant of the bank books in question and that said deposits represented by said bank books are the property of the complainant. His findings are warranted by the evidence.

The respondents' appeal is dismissed. The decree appealed from is affirmed and the cause is remanded to the Superior Court for further proceedings.

Joseph H. Coen, for complainant.

Daniel H. Morrissey, for respondents.

RICHARD W. JENNINGS, General Treasurer vs. U. S. Bobbin & Shuttle Co.

JUNE 29, 1922.

PRESENT: Sweetland, C. J., Vincent, Stearns, Rathbun, and Sweeney, JJ.

(1) Construction of Statutes.

In the construction of statutes, there is a presumption that they are intended to operate prospectively only and words ought not to have a retrospective operation unless they are so clear, strong and imperative that no other meaning can be annexed to them or unless the intention of the legislature cannot be otherwise satisfied.

(2) Tax Act. Construction. Carrying on Business for Profit.

"The tax act of 1912" was intended to operate prospectively, and as the corporate excess tax assessed June 1, 1912, was for the year 1912, the annual corporate excess tax assessed thereafter was for the year in which the tax was assessed, and consequently the tax assessed June 1, 1920, was for the year 1920, and where a corporation was not carrying on business for profit in this State during the year 1920, it was not liable for the tax assessed against it June 1, 1920.

ACTION ON THE CASE to collect a corporate excess tax. Certified for determination under cap. 298, § 4, Gen. Laws, 1909. Decision for defendant.

SWEENEY, J. This is an action on the case to collect a corporate excess tax alleged to be due the State. The action was brought in the Superior Court and, upon an agreed statement of facts being filed, was certified to this court for hearing and determination under authority of Section 4, Chapter 298, General Laws, 1909.

The declaration alleges that June 1, 1920, the Board of Tax Commissioners assessed against the defendant a corporate excess tax in the sum of \$1,264.09 in accordance with the provisions of Chapter 769 of the Public Laws passed at the January Session, 1912; that said tax was payable July 1, 1920; and that the tax was duly certified for collection by said Board to the plaintiff.

It appears from the agreed statement of facts that the defendant was incorporated under the laws of the State of

New Jersey; that November 13, 1919, the stockholders consented that said company be forthwith dissolved; that upon or about December 29, 1919, the defendant filed an affidavit in the office of the Secretary of State in New Jersey showing that the consent of the stockholders to dissolve the corporation had been advertised: that December 30. 1919, the directors of the said defendant met at Providence, R. I., and passed a vote authorizing the execution of a deed conveying all of the assets of the defendant; that deeds conveying all of the said assets were executed and delivered December 31, 1919; that the defendant continued business in this state until the usual hour for closing business December 31, 1919; that thereafterwards the only business transacted by the defendant was in paying its indebtedness then outstanding and paying its stockholders a dividend in liquidation; and that March 1, 1920, it made a return to said Board of Tax Commissioners, as of December 31, 1919, of the facts required by Section 9 of said Chapter 769.

The defendant claims that because it did not carry on business for profit in this state after December 31, 1919, it is not liable for the corporate excess tax assessed against it June 1, 1920.

The question arising in this action is, Is the defendant liable for a corporate excess tax assessed against it June 1, 1920, when it did not carry on business for profit in this state at any time during the year 1920?

Said Chapter 769, known as "The Tax Act of 1912," took effect February 15, 1912. "It was the introduction of a new system of taxation which amounted to an entire revision of the theory and practice of assessing and collecting taxes for the State." Mexican Pet. Corp. v. Bliss et al., 43 R. I. 243.

Section 9 of said Act provides that every corporation (with certain exceptions) carrying on business for profit in this state shall pay an annual tax to the state upon the value of that portion of its intangible property called its "corporate excess", and section 11 prescribes the method for

the determination of the value of the corporate excess for the purposes of assessment and taxation. The Act thus created a new classification of property of every corporation subject to taxation if the corporation carried on business for profit in this state. Said section 11 also provides that said Board on the first business day of June in each year shall make up a list of all corporations subject to tax upon their corporate excess, with the amount of the corporate excess of each, and shall assess a tax upon each such corporation at the rate of forty cents for each \$100.00 of the amount of its corporate excess and enter the amount of the tax against the name of each such corporation. is required to forthwith mail a notice of the amount of the tax to each such corporation; and the tax so assessed is payable on the first day of the following July. also provides that the owners of shares of stock in a corporation which is liable to a tax upon its corporate excess shall be exempt from taxation thereon. Section 20 and 8th paragraph of Section 39. The Act also provides that such tax, if unpaid, shall constitute a lien upon the real estate of the corporation for the space of two years after the assessment thereof.

For the purpose of assisting the Board in the determination of the amount of such tax, it is provided that every corporation liable thereto shall on or before the first day of March in each year return to said Board, as of December 31 next preceding, a statement of certain financial facts. From this statement or return, or from other information, the Board shall annually fix the fair cash value of the capital stock of each corporation for the said year or lesser time the corporation has carried on business.

In the construction of statutes there is a presumption that they are intended to operate prospectively only and words ought not to have a retrospective operation unless they are so clear, strong, and imperative that no other meaning can (1) be annexed to them or unless the intention of the legislature cannot be otherwise satisfied. 25 R.C.L., Section 35, Statutes.

There is nothing in the Tax Act to show that it was intended by the legislature to have a retrospective effect. The radical changes made in the method of assessing and collecting taxes for the state, including the classification and taxation of corporate excess, make it clear that the Tax Act was intended to operate prospectively.

By the express terms of the Tax Act the owners of stock in corporations subject to the corporate excess tax are exempt from taxation thereon. If the defendant were carrying on business in this state in 1911 the owners of shares of its capital stock were liable to pay taxes thereon during the year 1911 to the city or town in which such owners lived. In 1912 they would not be liable to such local tax because the corporation would be liable to assessment for a tax upon its corporate excess. This is the effect of the decision of this court in the case of R. I. Hospital Trust Co. v. Rhodes et als., 37 R. I. 141. The question in this case was whether the traction company was carrying on business for profit in this state in 1912 and the court decided that it was. June 1, 1912, the Board of Tax Commissioners assessed a corporate excess tax against said traction company and June 15, 1912, the assessors of taxes of the city of Providence assessed a local tax against the trustee of the owner of stock in said company. This court held that the assessment made by the assessors of taxes was invalid as the stock was not subject to local assessment.

If this court should hold that the assessment made June 1, by the Board of Tax Commissioners upon the corporate excess, is for carrying on business during the preceding year it would give a retrospective effect to the Tax Act which is not warranted by any words in the Act. It would also have the effect of deciding that all city or town taxes assessed during the year 1911 against the owners of stock in corporations subject to a corporate excess tax are invalid because June 1, 1912, the State Board assessed a tax for corporate excess against such corporations.

The fact that the corporation is required to make a return to the State Board before March 1, in each year, showing certain financial facts, as of December 31 next preceding, for the purpose of assisting the Board in the determination of the value of the stock of such corporation and to determine the amount of the corporate excess and assess a tax thereon June 1, does not cause the tax assessed June 1 to be due for the year ending December 31 next preceding.

The Board does not make the determination of the value of the capital stock solely upon the facts stated in the return but uses these facts in connection with such other information as it may have, and bases its judgment as to the value of the capital stock of such corporation upon all of the information the Board possesses.

The court is of the opinion that as the corporate excess tax assessed June 1, 1912, was for the year 1912 the annual corporate excess tax assessed thereafter was for the year in which the tax was assessed and, consequently, the corporate excess tax assessed June 1, 1920, against the defendant was for the year 1920. As it appears that the defendant was not carrying on business for profit in this state during the year 1920, it is not liable for the corporate excess tax assessed against it June 1, 1920, by said Board, and decision is rendered for the defendant.

The papers in said cause with our decision certified thereon are ordered to be sent back to the Superior Court for the entry of final judgment upon the decision.

Herbert A. Rice, Atty. General, for plaintiff. Lester S. Walling, of counsel.

Frederick A. Jones, for defendant.

Susan H. Graham, Ex. vs. Walter C. Nye et al.

JUNE 29, 1922.

PRESENT: Sweetland, C. J., Vincent, Stearns, Rathbun, and Sweeney, JJ.

(1) Elevators. Negligence.

Gen. Laws, cap. 129, § 16, providing that every passenger elevator shall be fitted with some suitable device to prevent the elevator car from being started until the door opening into the shaft is closed, covers not only the case of a moving elevator and the starting of the car before entrance or exit is accomplished but also requires that the door cannot be opened from the outside when the elevator is at rest.

(2) Negligence. Elevators. Pleading.

In a statutory action to recover for death of intestate through walking into an open elevator well, the declaration charged a violation of the duty imposed by Gen. Laws, cap. 129, § 16, which provides that every passenger elevator shall be fitted with some suitable device to prevent the car from being started until the door or doors opening into the shaft are closed, and that as a consequence the operator moved the car while the door opening into the shaft on one of the floors was open and deceased walked through the open door, the leaving of the door open was the proximate cause of the accident; the violation of the statutory obligation was continuous and the allegation to this effect in the declaration properly stated a cause of action.

(3) Negligence. Elevators. Evidence.

In a statutory action to recover for death of intestate through walking into an open elevator well, where the declaration charged a violation of the duty imposed by Gen. Laws, cap 129, § 16, evidence showing the lack of safety device prior to the accident was properly admitted, as the situation then was the same as at the time of the accident and continued unchanged.

STATUTORY ACTION to recover for death. Heard on exceptions of both parties and all overruled.

STEARNS, J. This is a statutory action to recover damages for the death of one William F. Graham, on November 11, 1919, caused by the alleged negligence of defendants, trustees and owners of the Imperial Apartments, in the city of Providence.

The declaration alleges a violation by defendants of the duty imposed upon them by Chapter 129, Section 16, General Laws, which provides that "every passenger elevator shall be fitted with some suitable device to prevent

the elevator car from being started until the door or door opening into the elevator shaft are closed;" that as a consequence the operator of the elevator was enabled to and did move the elevator to one of the upper floors of the building while the door opening into the elevator shaft on the second floor was open; that the hallway on second floor was dark; that deceased, who was seventy-six years of age was lawfully on the premises, that his eyesight was defective and he was not familiar with the premises; that upon coming from the ground floor of the building to the second floor hallway by means of the stairway, deceased walked through said open doorway leading into the elevator shaft and fell to the botton thereof, receiving injuries from which he died on the same day.

The elevator was operated in a closed elevator shaft in the building which has six stories. In the hallway of each floor there was a sliding wooden door at the elevator en-The safety device on the elevator prevented the operation of the elevator whenever a door opening into the elevator shaft on any of the floors was open, with the exception of the door on the second floor. The apartment of the janitor of the building was on the second floor. only entrance thereto was by a swinging door at the opening in the elevator shaft, and to leave this apartment and proceed to or from the hallway of the second floor, the occupant had to hold the elevator at the second floor and walk through the elevator to the hallway, the elevator on this floor being used apparently as a bridge from the hallway to this apartment. The janitor testified in regard to the elevator that "there was a safety device on the second floor but it was caught with a nail so it did not catch;" this was done designedly; the people living in the janitor's apartment had to have it that way, and this condition had existed for a considerable time—as long as the janitor had been there. There was a stairway running from the ground floor to the hallway on the second floor and thence to the hallways of the upper floors. The son of deceased occupied

a room on the third floor. He was ill and the deceased on the morning of November 11, came to Providence to call upon him. Repairs were being made on the first floor of the building on this day and, according to the statement of the janitor, the elevator was not running to or from the first floor that day. The janitor and his wife shortly after 8 a. m. ran the elevator from the second floor to the upper floor and began cleaning the apartments as was their custom. Shortly after 9 o'clock the elevator was again at the second floor and the door opening into the elevator shaft on the second floor was open. Within ten or fifteen minutes thereafter the deceased was seen to enter the building, ascend the stairway and proceed toward the hallway in the direction of the stairway leading to the third floor which was near the entrance to the elevator. The hallway was dimly lighted with a single gas jet. The elevator at this time was at one of the upper stories. Deceased fell into the elevator well and was killed. The janitor testified that he was the only person who operated the elevator that day; that the tenants of the building usually left early and there was no occasion to use the elevator that morning except such use as he made of it in going to the different floors to clean them; that he made one or more trips in the elevator but could not say at what hours: that he saw the elevator door open that morning on the second floor only when he used it and when the elevator was there. All of the hallway elevator doors except the door on the second story had iron keyholes and could be opened from the outside by the use of a key and could be opened only by the operator of the elevator from the inside when the elevator was at the floor level; but the second story door had an opening in the place of a keyhole and when closed could be opened easily from the outside by pushing a knife, pencil or stick through the opening.

The evidence is sufficient to warrant the conclusion that the door into the elevator shaft was open when deceased fell into the shaft; that the elevator was moved to an upper story while the door was open; and that deceased was not guilty of contributory negligence. The jury gave a verdict for plaintiff for \$5,000. The trial justice granted defendants' motion for a new trial unless plaintiff remitted all of the verdict in excess of \$3,500. Plaintiff took exception to this action of the trial justice. Defendants excepted to the refusal to direct a verdict in their favor and for certain other reasons. The case is now in this court on the bills of exceptions of both plaintiff and defendants.

The defendants claim that the object of the statute is to prevent injury to persons, by elevator cars only when they are in *motion* and to prevent accidents when passengers are entering or leaving an elevator and to prevent the starting of the car before the entrance or exit is accomplished; that the statute does not require that doors leading into the shaft must be kept closed or be so equipped that they can not be opened from the outside when the elevator is not in motion but at rest, nor that elevator cars must be opposite the floor level of a shaft door when such door is open.

An unprotected elevator well or shaft in a building is a

place of danger. In ascertaining the meaning of the act it is proper to consider the ordinary construction and use of elevators and the danger sought to be guarded against. One manifest danger is any unguarded opening into the elevator well. Section 15, Chapter 129, provides that any elevator (1) running in a building where "the well of which elevator is not so protected as to be inaccessible from without while the elevator is moving" shall be equipped with an automatic warning signal device which shall give an automatic warning signal that the elevator is in motion on every floor of the building which the elevator approaches. Section 16 provides that all elevator openings through floors where there is no shaft shall be protected by sufficient railings, trapdoors or other mechanical devices equivalent thereto. Having thus provided for the protection of openings in the floors in buildings where there is no elevator shaft, provision is then made in regard to buildings where there is an elevator

shaft: "Every passenger elevator . . . shall be fitted with some suitable device to prevent the elevator car from being started until the door or doors opening into the elevator shaft are closed." If defendants' construction of the act is correct the elevator door on every floor of the building might lawfully be left open when the elevator was not running and all doors could remain open when it was running, with the exception of the door on the particular floor on the level of which the elevator was in motion. need of protection from an opening in the floor is the same whether an elevator runs in a shaft or in a place which is not enclosed. If the protection of passengers while entering or leaving the elevator was the sole object of the act, it would have been necessary only to provide that the door on the level on which the elevator was at the time should be closed before the elevator could be started. But the act specifically provides that not only that door but all doors opening into the elevator shaft shall be closed before the elevator can be used. The safety device required by the statute must be so constructed that in order to operate the elevator at all, every door on the elevator shaft must be closed and kept closed. Additional protection of the openings into the elevator shaft is thus provided by reason of the fact that the lawful use of the elevator is only possible when all doors are closed. No particular locking device is required but the intent of the act is that all of the doors must be closed before the elevator is moved. The doors must be secured or at least latched in such manner that they can not conveniently and easily be opened by any person on the outside. In Weeks v. Fletcher, 29 R. I. 112 and in Baynes v. Billings, 30 R. I. 53, it was held that the provisions of this act were for the benefit of all persons, whether in or out of the elevator who are upon the landlord's premises, as emplovees, or by his invitation and that if the neglect of any of its provisions cause damage to such person without his fault, the act gives a right of action therefor.

The present case is quite different from Hope v. Longley, 27 R. I. 579, to which our attention is called by the de-In the Longley case it appears that the plaintiff. who had previously been employed to make repairs on the elevator when needed, was familiar with the premises; he knew that the elevator was in the habit of creeping, that it could have crept while the door was closed. Plaintiff walked into the elevator pit, through the door on the ground floor which was open, the elevator at the time being at the top of the building. The accident happened in the early morning. This door had been closed and locked the night before by the person who had last used the elevator and there was no evidence that any employee of defendant opened the door after it had been locked the night before. It was held that a nonsuit was properly granted on the ground that defendant was not guilty of any negligence in not keeping a (2) servant at the elevator during the night to see that the door was kept closed. In the case at bar the leaving of the door open was the proximate cause of the accident. The negligence complained of was the violation of an obligation imposed by statute. The negligence was continuous; the allegation to this effect in the declaration properly stated a cause of action. Defendants' exception to the form of the declaration is overruled. There was no error in the admission of evidence showing the lack of a safety device on the door of the second floor prior to the accident, as the situation then was the same as at the time of the accident and continued unchanged. Moreover, the janitor in his (3) deposition already had testified without objection to the same effect. The only other objection which requires mention is in regard to the reduction of the amount of the damages. This question was carefully considered by the trial justice and the reasons for his decision on this question appear in his rescript. We agree with the conclusion reached by him and plaintiff's exception to this action of

the justice is overruled.

All of the exceptions of the plaintiff and the defendant are overruled. The case is remitted to the Superior Court for a new trial unless the plaintiff on or before July 8, 1922, shall file in the Superior Court her remittitur of all of said verdict in excess of \$3,500. In case the plaintiff shall duly file such remittitur the Superior Court is directed to enter its judgment for the plaintiff for \$3,500.

Percy W. Gardner, Pirce & Sherwood, for plaintiff. Sidney Clifford, of counsel.

Alfred G. Chaffee, for defendant.

DANIEL KITCHEN vs. LEON ROSENFELD.

JUNE 29, 1922.

PRESENT: Sweetland, C. J., Vincent, Stearns, Rathbun, and Sweeney, JJ.

- (1) Malicious Prosecution. Advice of Attorney.
- It is a defence to an action for malicious prosecution, if the prosecutor acts upon the advice of a competent disinterested and regularly admitted practicing attorney in good standing that probable cause for commencing prosecution exists, provided the prosecutor honestly believes the accused is guilty and makes a full, fair, frank and free disclosure of all the circumstances to the counsel who advises him.
- (2) Malicious Prosecution. Advice of Counsel. Question of Fact.
- Whether a prosecutor acted upon advice of counsel and whether he made a complete disclosure of all the facts and circumstances are questions of fact for the jury. The mere statement of a prosecutor that he made a full disclosure is not conclusive; what he stated should be proved.
- (3) Malicious Prosecution, Malice.

In an action of malicious prosecution, malice may be inferred from lack of probable cause.

TRESPASS ON THE CASE for malicious prosecution. Heard on exceptions of defendant and overruled.

RATHBUN, J. This is an action of trespass on the case for malicious prosecution. The trial in the Superior Court resulted in a verdict for the plaintiff for seven hundred dollars. The case is before us on the defendant's exceptions as follows: to the refusal of the trial justice to direct a verdict for the defendant and to the ruling of said justice denying the defendant's motion for a new trial.

The plaintiff occupied a basement apartment in an apartment house owned by the defendant. For a short period the plaintiff was employed as a janitor by the defendant at said apartment house. The defendant discharged the plaintiff and a short time thereafter accused the plaintiff of wasting hot water in his apartment. The defendant complained to the police that the plaintiff had, during an argument which followed the accusation, threatened to kill the defendant. The police department investigated this complaint and also a further complaint of the defendant that the plaintiff had intentionally damaged the plumbing connected with a toilet in said house. The police refused to prosecute and thereafter the defendant employed an attorney to draft two criminal complaints against the plaintiff. The defendant furnished surety for costs and warrants were issued upon which the plaintiff was arrested and detained in a cell until the following day when he obtained bail. One of the complaints charged that Kitchen threatened to kill the defendant; the other charged that Kitchen wantonly and maliciously injured and defaced a building. On trial of these complaints Kitchen was found not guilty and was discharged in each case. Thereafter Kitchen commenced this suit for malicious prosecution.

(1) It is clear that the defendant instituted and prosecuted said criminal complaints and that on trial Kitchen was adjudged not guilty and was discharged. Has the plaintiff sustained the burden which the law casts upon him of proving that the prosecution of at least one of said complaints was commenced maliciously and without probable cause? The defendant was informed that just before the toilet in question was discovered to be in a damaged condition, the plaintiff had been seen coming out of another bathroom located on the same floor as the toilet which was

damaged. The defendant obtained no further evidence tending to show that the plaintiff damaged the plumbing connected with said toilet. In defence the defendant relied upon the fact that he was advised by a practicing attorney that there was probable cause for commencing the prosecution of each complaint. The defendant testified that he stated all of the facts to his counsel and that said counsel advised him that there was probable cause for prosecuting each of said complaints. The law of this State is in accord with the great weight of authority, which is that the prosecutor will be protected if he acts upon the advice of a competent, disinterested and regularly admitted practicing attorney and counsellor of law in good standing that probable cause for commencing prosecution exists, provided the prosecutor honestly believes the accused is guilty and makes a full, fair, frank and free disclosure of all the circumstances to the counsel who advises him. See Lee v. Jones, 44 R. I. 151, 116 Atl. 201; Fox v. Smith, 25 R. I. 255; 26 Cyc. 30 and 31; note to Ross v. Hickson, 26 Am. St. Rep. 123, 141.

Whether the prosecutor acted upon advice of counsel and) whether he made a complete disclosure of all the facts and circumstances are questions of fact for the jury. Fox v. Smith, supra. The mere statement of a prosecutor, in giving evidence in his defence, that he made a full and fair disclosure of all the facts to his counsel, is not conclusive. What he stated should be proved and the jurors should decide whether the statement made was a full and fair one or not. McLeod v. McLeod, 73 Ala. 42. See Fox v. Smith, supra.

The attorney whom the defendant consulted did not testify and the defendant did not state in detail what he told the attorney. Upon cross-examination the defendant testified that he told the attorney on whose advice he acted that the plaintiff was seen coming out of the bathroom containing the toilet which was damaged. Mrs. Silverstein is the person who saw the plaintiff coming out of a bathroom on the same floor as the damaged toilet. She gave this

information to a Mr. Taylor, the janitor, who in turn reported the fact to the defendant. The damaged toilet was located in a bathroom at one end of a hall. Mrs. Silverstein told Mr. Taylor that she saw the plaintiff coming from another bathroom at the opposite end of the hall and that said toilet had apparently been damaged before the plaintiff came out of the other bathroom. Mr. Taylor testified that he reported these facts to the defendant who did not deny that he was told by Taylor that Mrs. Silverstein saw the plaintiff coming from the other bathroom. As the apartment house in question contained forty tenants all of whom had access to the bathroom containing the toilet which was damaged, the plaintiff had no exclusive opportunity to injure said toilet. It not only appeared that the defendant had no probable cause for instituting criminal proceedings against the plaintiff for injury to said toilet but it also appeared that the defendant, either carelessly or intentionally, misrepresented the facts to the attorney whose advice he sought. Had the defendant told his counsel that the plaintiff had been seen coming from another bathroom at the opposite end of the hall instead of representing that the plaintiff had been seen just before the damage was discovered coming from the bathroom containing the toilet in question it is probable that said attorney, there being no other evidence (other than that of a possible motive) that the plaintiff was guilty, would have advised that there was not probable cause for prosecuting the plaintiff for injuring and defacing a building.

The question remains whether the defendant in prosecuting the plaintiff was actuated by malice. Malice may be inferred from lack of probable cause when the facts (3) warrant such inference. Atkinson v. Birmingham, 44 R. I. 123, 116 Atl. 205. There was an abundance of testimony that the defendant was extremely hostile toward the plaintiff. The jury evidently found that the defendant's conduct in instituting one of the criminal proceedings against

the plaintiff was malicious and without probable cause and we think the testimony warrants such finding.

The remaining exception is to the ruling denving defendant's motion for a new trial. We can not agree with the defendant's contention that the damages are excessive. During eighteen hours the plaintiff was in the custody of the sheriff and during one night he was confined in a cell. Plaintiff testified that he paid seventy-five dollars for counsel fees and seventy-five dollars to secure bail. testified to no other items. Regardless of the question of punitive damages five hundred and fifty dollars is not, in our opinion, an excessive amount to compensate the plaintiff for the indignity which he suffered. The trial court in his rescript denving the motion for a new trial used the following language: "The present defendant was at one time convicted of perjury, and this fact was laid before the jury in this case. Were it not for such testimony affecting the burden of proof there would not be much doubt in the mind of the Court that plaintiff had not sustained the burden of proof." Counsel for the defendant suggests that said justice assumed that the burden of proof shifted from the plaintiff to the defendant when it appeared that the defendant had once been convicted of perjury. It is clear that said justice intended to use the words "preponderance of the evidence" in place of the words "burden of proof." We find no reason for disturbing the verdict which has the approval of the trial court.

All of the defendant's exceptions are overruled and the case is remitted to the Superior Court with direction to enter judgment on the verdict.

Charles R. Easton, for plaintiff. John L. Curran, for defendant.

INDUSTRIAL TRUST Co. Ex. and Tr. vs. M. ETTA BABCOCK GARDNER et al.

JUNE 29, 1922.

PRESENT: Sweetland, C. J., Vincent, Stearns, Rathbun, and Sweeney, JJ.

(1) Wills. Intestacy.

It is reasonable to suppose that a man who makes a will does not intend to die intestate as to any part of his property.

(2) Wills. Residuary Provision. Legacies. Abatement.

Testator by will in the 5th and 7th clauses bequeathed gifts of \$10,000 and \$2,000 respectively, and by the 4th and 6th clauses bequeathed gifts of \$20,000 and \$10,000, respectively, in trust. By the 11th clause he directed his executor to sell all personal property not otherwise disposed of, also all real estate, the proceeds of said personal and real estate to be added to the 4th and 6th bequests, share and share alike, after all expenses of every description had been settled. At the time of his death the personal property of testator was less than \$5,000.—

Held, that to carry out the apparent intention of testator the 11th clause would be construed to be a general residuary provision, and from the proceeds of the sales of the real and personal property the executor should pay the expenses, debts and legacies provided for by the will, first paying the expenses of administration, the inheritance and legacy taxes, and all lawful claims, and out of the balance the legacies, and if the estate was insufficient to pay the legacies in full they must abate proportionably.

BILL IN EQUITY for advice in regard to will. Certified under Gen. Laws, cap. 289, § 35.

SWEENEY, J. This is a bill in equity brought by the executor and trustee of the will of Franklin N. Babcock, late of the town of Warwick, for the advice and direction of this court in administering the estate of said deceased. The cause has been certified to this court under authority of Section 35, Chapter 289, General Laws, 1909.

Mr. Babcock in his will, in addition to appointing an executor and ordering his funeral expenses and expenses of administration paid out of his estate, provided that the inheritance taxes and taxes assessed against the legatees should be paid, and directed his executor to provide perpetual care for the burial lot of his father.

In the ninth paragraph of his will he makes a specific gift of some household furniture and he disposes of the remainder of his property by four general pecuniary legacies. Two of these general legacies (bequests Nos. 5 and 7) are gifts of \$10,000.00 and \$2,000.00, respectively, and the other two general legacies (bequests Nos. 4 and 6) are gifts of \$20,000.00 and \$10,000.00, respectively, in trust.

The disposal of the residue of his estate is made by the eleventh paragraph of his will which is as follows: "Eleventh: I direct my Executors to sell all personal property, not otherwise disposed of, also all real estate I may die seized and possessed of, . . . the proceeds of said personal and real estate to be added to the bequests No. 4 and No. 6, share and share alike, after all expenses of every description have been settled."

Four of the legatees have answered the bill and a decree pro confesso has been taken against the other interested parties.

(2) The question submitted to this court is whether said paragraph eleven is in the nature of a residuary provision and whether the executor may pay from the proceeds of the sales of the real estate and personal property the expenses of administration, the debts of the deceased, and the legacies given by the preceding paragraphs in the will.

The answering legatees claim that said paragraph should be construed to be a general residuary provision in order to carry out, as far as possible, the intent of the deceased as shown in the other paragraphs of his will.

From a reading of the will it is apparent that the deceased intended to dispose of all of his property by will, that he had a high regard for the legatees named therein, and that it was his intention that they should share in the distribution of his estate to the amounts as expressed in his will.

It is reasonable to suppose that a man who makes a will does not intend'to die intestate as to any part of his property. *Pell* v. *Mercer*, 14 R. I. 412; *Smith* v. *Greene*, 19 R. I. 558.

It is stated that the deceased was a man advanced in years, a widower with no children, that at the time of his death his personal property was less than \$5,000.00, and that he owned some valuable real estate. On account of the small amount of personal property, if said eleventh paragraph is not construed to be a general residuary provision it will give the fourth and sixth general legacies a preference over the fifth and seventh general legacies, and the legatees mentioned in the fifth and seventh legacies may not receive anything on account of the insufficiency of the personal estate.

It is clear that the testator intended that the legatees mentioned in the fifth and seventh bequests should receive from his estate the sums given to them and in order to carry his apparent intention into effect the court construe said eleventh paragraph to be a general residuary provision.

The executor requests advice and direction as to whether it may pay from the proceeds of the sale or sales of said personal property and real estate described in said paragraph eleven any expenses other than those incident to such sale or sales, and as to the manner in which the several legacies shall abate in the event that the estate is not sufficient to pay all of them in full.

The executor is advised and directed that it may pay from the proceeds of such sale or sales the expenses of administration, inheritance and legacy taxes, and all lawful claims against said estate. Out of any balance remaining the executor may pay the general legacies mentioned in the fourth, fifth, sixth, and seventh paragraphs of said will. If said estate is insufficient to pay all of said legacies in full they must abate proportionably, and in such case the executor may pay out the residue of the estate pro rata to said legatees. Derby, Ex. v. Derby et als., 4 R. I. 414.

The parties may present to this court a form of decree in accordance with this opinion, July 3, 1922, at nine o'clock a. m., standard time.

Huddy, Emerson & Moulton, for complainant. George A. Breaden, for respondent Gardner. Felix Herbert, for other respondents.

MATHILDA GREENSTEIN vs. Morris Rosenstein.

JULY 3, 1922.

PRESENT: Sweetland, C. J., Vincent, Stearns, Rathbun, and Sweeney, JJ.

(1) Covenant. General Issue.

Where to an action of covenant commenced in a district court the defendant entered his appearance, so far as it can be considered that there was any issue on a claim of jury trial before the superior court, it was solely that which arises on the plea of non est factum, which has sometimes been treated as in the nature of the general issue.

(2) Deeds. Evidence. Covenants.

A deed speaks for itself in all its covenants and no evidence of prior negotiations or agreements between the parties can be received for the purpose of altering or contradicting its definite covenants.

COVENANT. Heard on exceptions of defendant and overruled.

SWEETLAND, C. J. This is an action of covenant. Upon a claim for jury trial made in the district court, the cause was tried in the Superior Court before Mr. Justice Brown sitting with a jury. At the close of the evidence on motion of the plaintiff said justice directed a verdict in her favor. The case is before us upon the defendant's exception to the action of said justice in directing a verdict for the plaintiff, and upon exceptions to the rulings of said justice made in the course of the trial.

The declaration alleges the conveyance by the defendant to the plaintiff of certain land in Providence, which was subject to a mortgage of thirty-two hundred dollars, by warranty deed dated September 1, 1920. This deed contained the defendant's covenant that the granted premises were free from all encumbrances save said mortgage for thirty-two hundred dollars. The declaration further alleges, as a breach of said covenant, that, in addition to said mortgage, at the time of the execution and delivery of said deed the premises were subject to the encumbrance of taxes assessed against said property on June 15, 1920 and

unpaid, and further that the plaintiff was obliged to pay said taxes in order to free said premises from their lien.

The defendant entered his appearance in the district court. Under the statute the entry of appearance in any case in the district court is equivalent to filing the general issue. The defendant filed no other plea save a so-called equitable plea in the Superior Court which upon demurrer was over-ruled. In the Superior Court the case went to trial solely upon whatever issue was raised by the entry of appearance in the district court.

Strictly there is no plea of the general issue in an action (1) of covenant. A plea of non est factum has sometimes been treated as in the nature of the general issue. At the trial in answer to a question of said justice as to what was the issue in the case counsel for defendant replied, "General issue, Your Honor," and to the further question of the justice, "How do you propose to set up a general issue in an action of covenant?", counsel replied: "That we did not make the covenant." So far as it can be considered that there was any issue before the Superior Court it was solely that which arises on the plea of non est factum.

The defendant did not deny the execution of the deed and the making of the covenant nor question the amount of the taxes paid by the plaintiff, which were assessed against the property and unpaid prior to the delivery of the deed. There was no question to be submitted to the jury and said justice properly directed a verdict for the plaintiff.

(2) The defendant excepted to the rulings of said justice excluding evidence as to certain agreements between the plaintiff and defendant with reference to said property which the defendant claims were made before the execution and delivery of the deed. This evidence clearly was not admissible under the issue on which the case was tried. Furthermore, the defendant would not be permitted to vary the effect of his deed in such manner. His deed speaks for itself in all its covenants. No evidence of prior negotiations or agreements can be received for the purpose of altering or

contradicting its definite covenants. Porter v. Bradley, 7 R. I. 538.

Defendant's exceptions are all overruled. The case is remitted to the Superior Court for the entry of judgment on the verdict.

Robinson & Robinson, David C. Adelman, for plaintiff. Joseph H. Coen, for defendant.

Screw Machine Products Corporation vs. Cutter & Wood Supply Co.

JULY 3, 1922.

PRESENT: Sweetland, C. J., Vincent, Stearns, Rathbun, and Sweeney, JJ.

(1) Principal and Agent. Contracts.

Where X. was in charge of a branch store of a company, and for several months had sold goods to plaintiff, although in much smaller amounts than the order in question, but sometimes in excess of the stock carried in the local store, and a large order from plaintiff was accepted by him, and thereafter plaintiff wrote defendant demanding compliance with the conditions of the order, and at no time prior to the trial did defendant suggest that X. had no authority to bind it, or that a contract had not been entered into, and a portion of the order was actually delivered.—

Held, that it was a question for the jury whether or not a contract was entered into between the parties.

(2) Principal and Agent. Contracts. Estoppel.

Where one knows that another, believing that former's agent had authority entered into an agreement with the agent and was relying upon the agreement and remains silent as to the lack of authority in the agent, he is bound by his own conduct in remaining silent.

(3) Contracts. Evidence.

In an action for breach of contract where plaintiff relied upon the apparent authority of the agent of defendant, question asked agent by defendant as to whether or not he had authority to accept orders in as large quantities as the order given, was properly ruled out, for if the principal gave the agent any secret instructions such instructions were not brought to the attention of the plaintiff and were not binding upon him.

(4) Contracts. Extension of Times. Measure of Damages.

Where a seller is unable to make delivery when performance is due and by mutual consent or by election of buyer to continue the contract, the time for delivery is extended, damages are to be calculated as of the time fixed by the later agreement.

Assumpsit. Heard on exceptions of defendant and overruled.

RATHBUN, J. This is an action in assumpsit. The declaration alleges that the parties entered into a contract whereby the plaintiff agreed to buy and the defendant agreed to sell a certain number of drills; that the defendant broke the contract by refusing to make delivery in accordance with the terms of the contract. The trial in the Superior Court resulted in a verdict for the plaintiff for \$2,895.32. The case is before us on the defendant's exceptions, as follows: to the refusal of the trial court to direct a verdict for the defendant; to the admission and exclusion of testimony; to the refusal to strike out certain testimony; to certain instructions to the jury; to the refusal to instruct as requested, and to the refusal of said court to grant the defendant a new trial.

The defendant was a dealer in tools and mill supplies, with the main store and office located in the city of Boston and a branch store located in the city of Providence. The business was both wholesale and retail. Only a small stock was carried in the Providence store. On September 27, 1915, Mr. Barnett, manager of the Providence store, obtained from the plaintiff an order or orders for 334 dozen right hand and 334 dozen left hand high speed twist drills at the price of $62\frac{1}{2}$ per cent off the catalogue price. Mr. Barnett attempted to obtain the order for 60 per cent off but plaintiff refused to agree to pay more than the catalogue price less $62\frac{1}{2}$ per cent.

The plaintiff contends that Barnett at the time he obtained said order agreed to fill the order by delivering at once such portions of the order as the defendant had in stock and the balance as soon as it could be obtained from the manufacturer, the Cleveland Twist Drill Co., and not later than two months. The defendant contends that Barnett accepted the order with the understanding that he would fill the order provided he could obtain the drills for the

plaintiff at the catalogue price less $62\frac{1}{2}$ per cent. The defendant also contends that its agent had no authority, either express or implied, to bind the defendant by entering into a contract to sell such a large number of high speed drills.

After conferring with his principal Mr. Barnett, on October 12, 1915, in a conversation by telephone, told the plaintiff's purchasing agent that the defendant could not fill the order at the catalogue price less $62\frac{1}{2}$ per cent. On the following day the plaintiff replied by letter, as follows:

"October 13, 1915.

CUTTER AND WOOD SUPPLY Co. 131 Washington Street, Providence, R. I.

Attention Mr. Barnett Re-Manager.

Gentlemen:

R. I.]

Confirming the conversation between yourself and the writer yesterday, we expect you to fill our orders No. 12730, 12731, 12732, 12733, 12735, and 12736 for right hand straight shank Cleveland Twist Drills at a discount of $62\frac{1}{2}$ per cent from the regular Cleveland Twist Drill price list. These orders were given you at your request in the presence of Mr. Swan of the Cleveland Twist Drill Company, Mr. McDermott and the writer of this company, at a discount of $62\frac{1}{2}$ per cent and from a strictly business stand point it is up to you to fill the orders at your own discount, viz., $62\frac{1}{2}$ per cent.

It seems very strange to us that fifteen days after this order has been in your hands that you should come to us and tell us that you cannot accept the order at the price at which you took it. Had you advised us at once that you were not in a position to fill the order at a discount of $62\frac{1}{2}$ per cent we could have purchased from another concern without loss of money to us, but now it is too late for us to place the order with your competitors without paying them a higher price than

would have been the case when the order was first placed with you, and you at the time you took this order, were aware of the fact that we could place the business with your competitor without paying him a higher price than he had been receiving for the past year or so.

As stated to you yesterday, we do not like to see anybody accept our orders and take them at losing basis, but looking at the proposition from any angle that you choose, we believe that you will be confronted with the fact that you are bound to fill the order, particularly under the existing circumstances, at the price which you took it.

Yours very truly,

THE SCREW MACHINE PRODUCTS CORP.

LEO P. BURGESS, Purchasing Dept."

The price of drills advanced soon after said order was taken and continued to advance very materially for a period of several months, during which time the defendant made deliveries of drills on said order at the catalogue price less 62½ per cent. All left hand drills specified in the order were delivered but the defendant failed to deliver a large portion of the right hand drills specified in the order and for this failure the plaintiff is seeking damage.

The 21st exception is to the refusal of the trial court to direct a verdict for the defendant. The defendant argues that there was no evidence that Barnett had authority, either express or implied, to agree on behalf of his principal to fill the order in question and that there was no evidence that such agreement if made was ratified by the principal. Whether Barnett agreed to fill said order was clearly a question of fact for the jury and while there was no proof of actual authority we cannot say that there was no evidence that he had apparent authority to make such agreement. He was in charge of a branch store. For several months he

R. I.]

had sold goods to the plaintiff. While the individual and total orders of the plaintiff for high speed drills were small compared with the order in question, Barnett did fill orders for the plaintiff for carbon steel drills in quantities apparently in excess of the stock carried in the local store. It is possible that Barnett conferred with his principal before filling or agreeing to fill orders in excess of stock which he carried in the store but if he did such facts were not brought to the attention of the plaintiff. Furthermore we can not say that the jury were not warranted in inferring that the principal by its conduct ratified the agreement of its agent. December 24, 1915, the plaintiff wrote to the defendant, saying, "unless we receive without further delay substantial shipment against the above mentioned order, it will be necessary for us to purchase these orders on the open market and to charge you the difference between the price which we will be compelled to pay and the price at which you took these orders." May 16, 1916, the plaintiff wrote to the defendant saying, "If we have not heard from you regarding this matter by Friday, June 2d, we will take other steps to secure a satisfactory settlement of this order." Plaintiff wrote to the defendant several other letters of similar purport. On July 31st the plaintiff by letter gave defendant notice that unless delivery of the balance of the order for the right hand drills should be completed at once the plaintiff would secure the drills from other dealers and charge the defendant with the excess in price. On September 23, 1916, the plaintiff by letter gave notice to the defendant that no more deliveries would be received and that the plaintiff would hold the defendant liable for damages resulting from breach of the contract. Most, if not all, of the numerous letters from plaintiff to defendant concerning the subject now in dispute were addressed to the Providence store. On October 12, 1915, Barnett, in a conversation by telephone, did tell the plaintiff that the defendant could not fill the order at the price stated but neither the principal nor the agent at any time before the trial suggested to the plaintiff that

Barnett had no authority to bind his principal or that a contract for a sale of the drills in question had not been entered into by the parties.

It was argued that the delivery of drills from time to time on said order at the price specified in the order was consistent with an undertaking to fill the order to the extent of the defendant's ability and that the delivery of drills on

said order at a loss when they might have been readily sold at a substantial profit was done for the sole purpose of accommodating a customer. We think that such conduct is more consistent with a knowledge that the agent had entered into a contract to fill said order. If knowledge came to the principal that the agent had exceeded his authority and the principal was unwilling to be bound by the act of the agent it was the duty of the principal to promptly bring the facts to attention of the plaintiff. If the defendant (2) knew that the plaintiff, believing that the defendant's agent had authority, entered into an agreement with said agent and the defendant knew that the plaintiff was relying upon said agreement and the defendant remained silent as to the lack of authority in the agent, the defendant is bound by his own conduct in remaining silent. It is a familiar maxim that he who refuses to speak when he should will not be permitted to speak when he would.

A description of the drills ordered was, by reference to catalogue numbers, typewritten on the plaintiff's regular order sheets which contained in the margin printed instructions under various headings. Under "DELIVERY" is the following: "Unless delivery be made within one day of date of order, we must have written acceptance by return mail stating delivery and actual shipping date. As soon as possible and promptly are not dates. Material must be delivered within time agreed, otherwise we reserve right to cancel." The defendant argues that the first sentence of the language above quoted conclusively shows that an order, to be accepted only in writing, was given and that no contract was made. The plaintiff's testimony is to the

effect that this typewritten description of drills was not an order but was a memorandum and was not made until after the terms of the contract for the purchase and sale of the 334 dozen right hand and the 334 dozen left hand drills was completed. There was no attempt to vary, by parol testimony, the terms of a written contract for no one contends that these several sheets of paper were written contracts. Under "PRICE" is printed the following: "This order must not be filled at a higher price than noted on order nor at a higher price than last charged or quoted. When price is 'delivered our factory,' prepay freight." We find no price "noted" on any of these sheets but the parties agree that the price was to be the catalogue price less $62\frac{1}{2}\%$. To one having this information the language last quoted might indicate that the typewritten sheets were not orders to be accepted. As we have above stated it was a question for the jury on all of the evidence whether the parties contracted. Exceptions 4, 5, 21, 27, 30, 32 and 33 are each Exceptions 1, 2 and 3 were to the admission overruled. of testimony relative to left hand drills. The defendant contends that the sale of left hand drills was a separate transaction and that the testimony concerning the sale and delivery of left hand drills tended to confuse the issue. There was testimony to the effect that the agreement for the sale of left hand and right hand drills was not separable but was an entire contract. The testimony objected to was admissible as it tended to show that the defendant recognized the existence of a contract between the parties for the delivery of right hand as well as left hand drills.

The 18th exception was to the admission of the defendant's invoice of drills to the plaintiff on May 12, 1916, at a price higher than the contract price. We find no merit in this exception.

The 17th exception is to the refusal of the trial court to strike out testimony. On cross-examination said Barnett, a witness called by the defendant, was asked the question, "Didn't you at that time request Mr. Briggs to release you from delivering the balance of those drills?" The purpose of the question evidently was to show that the witness made no contention that a contract did not exist between the parties. The witness answered "No," and then added, "I may have asked Mr. Briggs to state some offer to avoid trouble. We were very anxious to avoid trouble and expense of going to law and willing to do anything in reason, almost, to avoid that." The defendant took exception to the refusal of the court to strike out all of the answer following the word, "No." The language contained an implied denial of liability and was a voluntary statement by witness called by defendant. Under the circumstances we do not consider the ruling of the court refusing to strike out said language reversible error.

The 15th exception is to the refusal to permit Barnett to answer the following question: "Now, did you or did you not have authority from your principal in Boston to accept orders for any quantity as large as that?" The plaintiff (3) relied upon Barnett's apparent authority. If the principal gave the agent Barnett any secret instructions such instructions were not brought to the attention of the plaintiff and were not binding on the plaintiff. The refusal to permit the question to be answered was not error.

The 19th exception was to the exclusion of similar testimony and is also overruled.

The 35th exception is to the refusal of the trial court to grant a new trial. In considering the exception to the refusal to direct a verdict for the defendant we have discussed the defendant's contention that no valid contract was entered into by the parties. The defendant further suggests that the damages awarded are excessive for the reason that, as he contends, if a contract existed between the parties it was broken on October 12, 1915, when Barnett told the plaintiff that the defendant could not fill the order at the price stated and was also broken when deliveries were not completed at the expiration of two months from

the date when the order was obtained and that in computing the damages the market price of drills on one of these two dates should have been considered rather than the much higher price of August or September, 1916.

The defendant excepted to the admission of testimony as to the market value of drills after December, 1915. fendant at no time repudiated the contract and we think that the testimony warrants a finding that the time for making delivery was from time to time, at the request of the defendant, extended. The plaintiff was not bound to give any extension and it might have brought suit instead of granting further time. If the time for delivery was extended at the request of the defendant it ought not to complain because the plaintiff granted the request instead of treating the contract as broken and buying in the market at that The rule for assesing damages in a case of this nature is stated in Williston on Contracts, Sec. 1383, as follows: "Sometimes when the seller is unable to fulfill his obligation at the time when performance was due, by mutual consent or by the election of the buyer to continue the contract in spite of the seller's default, the time for delivery is extended. The damages are then to be calculated as of the time fixed by the later agreement."

In Ogle v. Vane, L. R. 2 Q. B. 275, the defendant agreed to deliver 500 tons of iron to the plaintiff by the end of July and none had been delivered at said date and at the request of defendant plaintiff waited until February of the following year. Defendant failed to deliver in February and plaintiff sought to recover damages as of February. Defendant contended that inasmuch as the contract was broken at the end of July the damages should be fixed as of that time and that since no new contract was entered into the measure of damages could not be altered by subsequent events. The court, at pp. 281 and 283, said: "I agree that the plaintiff did not make a binding contract at law, because he never contracted at all" (referring to the consent to extend time for delivery); "but I think that what he did operated so far

that it amounted to a postponement of the day at which he might go into the market, and at which the jury might calculate the measure of damages." . . . "Here there was no substitution of one contract for another. Here the inference which I think the jury might well draw as the result of the evidence is that the parties did no more than this: The plaintiff was willing to wait, at the request of the defendant, for the defendant's convenience, and he did wait a long time, till February; but if he had lost patience sooner, and refused to wait any longer, he would have had a right to bring his action at once for the breach in July. clearly a case of voluntary waiting, and not of alteration in the contract; and the length of time can make no difference." See also Brown v. Sharkey, 93 Iowa, 157; Ralli v. Rockmore (Ga.) 111 Fed. 874; Consumers' Bread Co. v. Stafford County Flour Mills Co. (Kan.) 239 Fed. 693; Hickman v. Haynes, L. R. 10 C. P. 598; Schultz v. Glickstein, 168 N. Y. Sup. 490; Sedgwick on Damages, 9th Ed. Vol. 2, § 737.

Exceptions 6 to 13, inclusive, and exceptions 25 and 28 are each overruled.

The 35th exception, which was to the refusal to grant a new trial, is also overruled.

All of the defendant's exceptions are overruled and the case is remitted to the Superior Court with direction to enter judgment on the verdict.

Frederick W. O'Connell, Swan, Keeney & Smith, for plaintiff.

McGovern & Slattery, for defendant.

JOSEPHINE MACCHIA VS. JOSEPH H. DUCHARME.

JULY 6, 1922.

PRESENT: Sweetland, C. J., Vincent, Stearns, Rathbun, and Sweeney, JJ.

⁽¹⁾ Trial. Report of Trial.

The intention of the statutes is that the court stenographer shall be present throughout the whole trial, except perhaps during the argument of counsel,

so where a jury came in for further instructions which were given without a stenographer and in the absence of counsel, it constituted reversible error.

(2) Trial. Notice to Counsel.

Rule 17 of the rules of practice of the Superior Court provides that before giving further instructions to the jury after they have retired, the trial justice shall cause the attorneys, if absent, to be notified by sending notice to them if within convenient reach provided the attorneys have left word with the justice where such notice is to be sent and provided further that the justice shall not be required to wait more than fifteen minutes after sending such notice.—

Held, that under the rule the court discharged its duty if notice is properly sent and is not responsible for its actual receipt.

(3) Trial. Notice to Attorneys.

Where counsel after the jury had retired, asked the court if he might go to his office and was told his presence in court was not required, and then stated to the court that he would go to his office and the court knew the location of his office and the attorney remained there but was not sent for when the jury returned for further instructions, the fact that he did not give his office address again is not important nor in the circumstances did his failure specifically to ask that he be called deprive him of his right to notice and failure on the part of the court to notify him, was error. Such error is not necessarily reversible if the court has preserved by any method a record of what was said or done in the absence of counsel.

TRESPASS ON THE CASE for negligence. Heard on exceptions of defendant and sustained.

STEARNS, J. The plaintiff, who was a passenger in a motor bus which was owned and operated by the defendant, was injured in consequence of a collision between said motor bus and another automobile. The plaintiff brought suit against defendant in an action on the case for negligence. After a trial by jury, which resulted in a verdict for the plaintiff, defendant is now in this court on his bill of exceptions.

There was no error in the refusal to direct a verdict for the defendant; there was sufficient evidence of negligence on the part of the defendant to require the submission of the case to the jury.

The seventh and eight exceptions will be considered together as, although presenting distinct objections, they are based on the bill of exceptions and the affidavits of

defendant and his counsel, which were made a part of the bill of exceptions by consent of the trial justice, together with a statement of fact added to the bill of exceptions by the trial justice. From the affidavit of defendant's counsel it appears that after the charge had been made to the jury and the jury had retired to the jury room, counsel asked the trial justice if he should remain in court to await the return of the jury or if he might go to his office, and was told by the trial justice that he did not require his presence in court. Counsel then stated to the court that he would go to his office. The trial justice knew the location of the office, which was not far distant from the Court House. After the jury had been out for over two hours, they requested further instructions. The trial justice in his statement of fact in the bill of exceptions makes the following statement: "The jury came in for further instructions at the request of the foreman at 5:10 p. m., the stenographer then having left the building. The Court briefly restated the law in the absence of the attorneys. Mr. Archambault had not specifically asked to be called and had not left his address with the court." In the affidavit of the defendant it is stated that when the jury returned for further instructions the trial justice "spoke to the jury and read from a book;" that after receiving the instructions the jury then retired to the jury room for further deliberation and at about 5:20 p. m., returned to the court room and announced that it had found a verdict for the plaintiff in the sum of six hundred dollars. Mr. Archambault, the attorney for defendant, remained in his office until six p. m., but was not sent for or notified by the trial justice that further instructions were to be given to the jury. The additional charge to the jury is not in the record and nothing further in regard to the nature and extent of the charge appears, other than as stated above. From the fact that the jury after having received this second charge arrived at a verdict within a few minutes thereafter, it is not unreasonable to conclude that they were directly influenced thereby in reaching a verdict and that the instructions were not in regard to some unimportant phase of the case but were directed to matters of importance. That this was the fact would seem to be confirmed by the statement of the trial justice that he restated the law of the case to the jury. Objection to this action of the trial justice is the basis of the eighth exception.

By Section 3, Chapter 278, Gen. Laws, it is provided that the proceedings in the trial of every action or proceeding. civil or criminal, in the Superior Court shall be reported by official court stenographers, and by Chapter 298 it is required · that a transcript of the evidence and instructions to the jury must be filed as a prerequisite to a consideration by this court of any objections thereto. The object of requiring 1) stenographic reports of court proceedings is to secure an accurate and complete official transcript of the record of . such proceedings. The intention of the statutes is that the court stenographer shall be present throughout the whole trial, except perhaps during the argument of counsel, as it is not the practice nor is it required that the arguments of counsel should be reported. In this case the trial justice might either have had his instructions reported by some other court stenographer or he might have written out his additional instructions and have read them to the jury. either course had been followed a complete record of the proceedings as required by statute could have been made. Such a record is required both for the protection of the rights of the litigants and to enable this court properly to exercise its duty in reviewing the proceedings of the Superior Court. We do not mean to establish a rule that each word used by court, counsel or witnesses must be reported. many cases it is not necessary and in some cases it is not possible to do so. But there must be a substantial and reasonable compliance with the statutory provisions.

The seventh exception is based on the failure of the trial justice to send notice to the counsel before giving further 2) instructions to the jury. Rule 17 of the Rules of Practice of the Superior Court provides that before giving further

instructions to the jury after they have received instructions and retired, the trial justice shall cause the attorneys in the case, if absent, to be notified by sending notice to them, if within convenient reach, "Provided said attorneys shall have left word with the justice where such notice is to be sent, and provided further that the justice shall not be required to wait more than fifteen minutes after sending such notice." It is the duty of counsel to be present in court during all stages of the trial. If he leaves the court after the jury has retired without notice to or excuse by the court, the court is justified in proceeding on the assumption that counsel does not care to be present at the subsequent proceedings in the trial. Counsel by his absence can not be permitted to interrupt the continuance of the proceedings, such as the giving of additional instructions when necessary and the rendition of the verdict. In Alexander Bros. v. Gardiner, 14 R. I. 15, it was held that the sending for counsel before giving further instructions to the jury was a favor or courtesy not a duty and therefore the omission to send for counsel was no ground for a new trial. Rule 17 was adopted subsequent to the decision in the Gardiner case, at the time when the Superior Court was created. complying with the requirements of this rule counsel are now entitled as a matter of right to have a notice sent to a designated address. Reid v. R. I. Co., 28 R. I. 321. has discharged its duty if notice is properly sent and is not responsible for the actual receipt of notice. If an attorney desires to absent himself while the jury is deliberating and to receive notice, he must notify the trial justice where notice is to be sent, remain within convenient reach of the court room and in any event must be present in court within

(3) fifteen minutes after notice has been sent. In the case at bar counsel went directly to his office and remained there continuously until sometime after the verdict was returned. He was within convenient reach of the Court House and expected to be notified by the trial justice if further instructions were requested. He had obtained permission of

the trial justice to leave the court room to go to his office. The trial justice knew the location of his office. The fact that counsel did not give his office address again is unimportant nor do we think in the circumstances that failure of counsel specifically to ask that he be called by the trial justice deprived him of the right to notice. He required no permission of the court to allow him to go to his office. Having secured permission to go to his office, and having been excused from waiting for the verdict, we think counsel must be held to have complied with Rule 17. As he was entitled to have notice sent to his office, failure to send such notice was error on the part of the trial justice. Such error however is not necessarily reversible error in every case. If the trial justice had preserved by any method a record of just what was said or done by him in the absence of counsel, it might well appear that defendant had suffered no substantial injury. But the record of this case is incomplete in regard to matters of substance and defective by reason of the failure of the court to observe the statutory requirements. Even if counsel was not entitled to notice, by failure to comply strictly with the requirements of Rules 17, defendant was nevertheless entitled to have the trial proceed according to the established rules of law and he can not by the mere fact of the absence of his counsel from the court room be deprived of his right to the observance of the required legal procedure.

As the defendant is entitled to have a new trial, it is unnecessary to consider his other exceptions:

The defendant's seventh and eighth exceptions are sustained and the case is remitted to the Superior Court for a new trial.

John F. Harlow, Jr., for plaintiff.

Archambault & Archambault, Joshua Bell, for defendant.

ANGELO GRANDE vs. THE EAGLE BREWING CO.

JULY 3, 1922.

PRESENT: Sweetland, C. J., Vincent, Stearns, Rathbun, and Sweeney, JJ.

(1) Intoxicating Liquors. Liquidated Damages. Penalty.

Defendant a wholesale liquor dealer entered into a contract with plaintiff to purchase a retail liquor saloon and a liquor license granted to X. for \$4,000; one hundred dollars to be paid on the execution of the agreement and four hundred dollars at the time the license was transferred to plaintiff and the balance on mortgage. Plaintiff paid the \$100 entered into possession of the saloon and conducted the business for some months. Defendant applied for a transfer of the license standing in the name of X. to plaintiff and the licensing board voted to transfer it but plaintiff never signed the bond and the license was never transferred. During the time plaintiff ran the saloon he purchased his liquors from defendant and after abandoning the business brought suit against defendent under Gen. Laws Cap. 123, § 60, to recover the money paid defendant for the liquors. The contract between the parties provided that in case plaintiff refused to wholly perform, the money paid by him to defendant on account of the purchase price "shall be retained as liquidated damages."—

Held, that defendant could not urge in set-off the \$400 payment due when the license was transferred, even if such contention was proper, since under the agreement defendant's damages were liquidated.

Held, further, that plaintiff never became a licensed dealer.

Held, further, that in this form of action plaintiff was not seeking to recover a penalty, but his right of action arose at the time he paid the money, not under the statute but at common law to recover back the money because it was received without consideration.

Held, further, that as plaintiff was not seeking to recover a penalty it was unimportant whether Pub. Laws, 1922, cap. 2231, or the so-called Volstead Act (both passed after the rights of the parties became fixed) repealed any of the provisions of cap. 123, but assuming they did, the repeal did not take away the common law action to recover money paid without consideration and further such repeal could not supply a consideration where none existed or render criminal an act of the plaintiff which was not prohibited when done.

Assumpsit. Heard on exceptions of defendant and overruled.

RATHBUN, J. This is an action in assumpsit to recover money paid by the plaintiff to the defendant for intoxicating liquors sold by the defendant, who at the time held a wholesale and retail liquor license, to the plaintiff, an unlicensed dealer in intoxicating liquors, for resale. The justice presiding at the trial in the Superior Court directed a verdict for the plaintiff for \$901.19. The case is before this court on the defendant's exception to the direction of a verdict.

The defendant was a holder of a wholesale and retail liquor license granted in accordance with the provisions of Chapter 123. Gen. Laws, 1909. It is alleged that the defendant in selling said liquors violated the provisions of Section 7 of said chapter, which section is as follows: "No person holding a license under the provisions of this chapter shall sell any of the liquors enumerated in this chapter to any unlicensed dealer in intoxicating liquors, nor to any owner or keeper of any house of ill-fame, having reason to believe that the same are to be resold; and every person holding a license found guilty of violating the provisions of this section shall be fined one hundred dollars and imprisoned thirty days, and shall thereby be disqualified for holding a license of any kind under the provisions of this chapter for a period of five years." Section 60 of said chapter provides as follows: "All payments or compensation for liquors sold in violation of law, whether in money, labor or personal property, shall be held and considered, as between the parties to such sale, to have been received in violation of law, without consideration and against equity and good conscience."

The parties agreed as to the amount of money which the plaintiff had paid the defendant in compensation for intoxicating liquors. The defendant knew that the plaintiff was an unlicensed dealer and that the liquors were purchased for the purpose of resale in violation of law. On December 20, 1916, the parties entered into a contract whereby the defendant agreed to sell and the plaintiff agreed to buy a retail liquor saloon, located at No. 257 Wickenden street in the city of Providence, including the personal property located in said saloon and a retail liquor license granted to one Frank R. Macfarlane, for the sum of four thousand dollars, to be paid as follows: "ONE HUN-

DRED (100) DOLLARS on the signing of these presents. FOUR HUNDRED (400) DOLLARS at the time the license is transferred to said party of the second part and the said party of the second part will give to the party of the first part a personal property mortgage upon the saloon, contents and present and future licenses, said mortgage to be for the sum of THIRTY FIVE HUNDRED (3500) DOLLARS, without interest." Upon the signing of the contract the plaintiff paid one hundred dollars to the defendant as required by the terms of the agreement, entered into possession of said saloon and for several months thereafter conducted therein The defendant applied to the a retail liquor business. Board of Police Commissioners for a transfer of said license to the plaintiff. On February 6, 1917, said board voted to transfer said license to the plaintiff but the plaintiff never signed the bond required by statute or had his sureties approved by said board and the license was never transferred. The plaintiff conducted said saloon from December 20, 1916, to May 17, 1917, when he abandoned the saloon without completing his said contract with the defendant. During the time the plaintiff was in possession of the saloon he purchased from the defendant the liquors which he sold in the saloon. The monies which he paid to the defendant for said liquors he is attempting by this suit to recover.

The defendant pleaded the general issue and also in set-off and contends as follows: 1. That the defendant is entitled to a set-off to the extent of four hundred dollars, the amount which by the terms of said agreement was to become due the defendant from the plaintiff when the license should be transferred. 2. That after February 6, 1917, the date on which said board voted to transfer said license to the plaintiff, the plaintiff was not an unlicensed dealer and that the plaintiff can not recover any sums of money which he paid to the defendant for liquors after said date. 3. That the plaintiff is asking to recover a penalty imposed by said Section 60 for the violation of the provisions of Section 7 of said chapter; that an act of Congress, known as the Vol-

stead act, by implication and Chapter 2231 of the Public Laws of 1922, in express terms has repealed said Sections 7 and 60 and thereby deprived the plaintiff of any right which he may have had to maintain this action.

The defendant argues that inasmuch as it did all things which the defendant was required by the terms of said contract to do and that the plaintiff prevented the transfer of said license by his neglect and refusal to produce his sureties for approval and to file the bond required by statute as a condition precedent to the transferring of said license. the plaintiff should not be permitted to take advantage of his own wrong by urging that because the license has not been transferred the four hundred dollar payment provided for in said contract has not become due. The contention would not appear to be entirely without merit were it not for the fact that the parties by the terms of said contract stipulated what the liquidated damages should be in the event of a failure on the part of the plaintiff to complete the agreement. Said contract contained a clause as follows: "In case said Angelo Grande refuses to wholly perform this agreement, except for reasons aforesaid, said money paid on account of the purchase price shall be retained by said Eagle Brewing Company as liquidated damages."

The rule is stated in 8 R. C. L. § 127, at p. 578, as follows: "If a provision is construed to be one for liquidated damages, the amount named forms, in general, the measure of damages in case of a breach, and the recovery must be for that amount. No other or greater damages can be awarded, even though the actual loss may be greater or less."

Did the plaintiff on February 6, 1921, become a licensed dealer by virtue of the vote of said board to transfer said license to him? This question must be answered in the negative. The plaintiff did not file a bond as required by statute. No license was issued to him and no license could have been issued to him before he filed a bond. Section 2 of said chapter contains a provision as follows: "Before any license shall be issued under the provisions of this

chapter, the person applying therefore shall give bond to the city or town treasurer in the penal sum of one thousand dollars, with at least two sureties satisfactory to said council or board." The vote of said board would have been no protection to him had he been prosecuted for selling intoxicating liquors. 23 Cyc. 120. See State v. Conley, 22 R. I. 403.

We are of the opinion that the plaintiff is not seeking to recover, as the defendant contends, a penalty provided in Section 60 of said Chapter 123 and it is therefore unimportant whether said Chapter 2231 or said Volstead act (both of which were passed after the rights of the parties to this action became fixed) repealed any of the provisions of said Chapter 123. Said Section 60 provided that: "All payments or compensation for liquors sold in violation of law, whether in money, labor or personal property, shall be held and considered, as between the parties to such sale, to have been received in violation of law without consideration and against equity and good conscience."

It was suggested that if said Section 60 has been repealed the parties are now in pari delicto. The plaintiff after the purchase of liquors from the defendant may have violated the provisions of said chapter by selling and keeping said liquors for sale but the parties were not in pari delicto in making the sale and purchase of the said liquors. It was unlawful for the defendant to sell but the statute did not forbid the plaintiff to buy. A repeal of the statute could not either supply a consideration where none existed or render criminal an act of the plaintiff which was not prohibited when done. The plaintiff paid money to the defendant which was received without consideration. The plaintiff at the time he paid the money had an action, not under the statute but at common law, to recover back the money because it was received without consideration. McGuinness v. Bligh, 11 R. I. 94; Gorman v. Keough, 22 R. I. 47.

Although the legislature in passing said Section 60 recognized the existence of the common law right to recover back

money which had been paid without consideration, said section gave no new right of action but simply declared that money paid for liquors to be sold in violation of law is received without consideration. Assuming that said sections are repealed, the repeal did not take away the common law action to recover money paid without consideration. The plaintiff does not need the statute except for the purpose of determining what his rights were when he paid the money. See Coggeshall v. Groves, 16 R. I. 18. Peters v. Goulden, 27 Mich. 171.

The defendant's exception is overruled and the case is remitted to the Superior Court with direction to enter judgment on the verdict as directed by the court.

John L. Curran, for plaintiff.

McGovern & Slattery, for defendant.

THE PETITION FOR WRIT OF PROHIBITION IN BELLE STANTON McLaughlin vs. James McLaughlin.

JULY 6, 1922.

PRESENT: Sweetland, C. J., Vincent, Stearns, Rathbun, and Sweeney, JJ.

(1) Prohibition.

The ordinary office of a writ of prohibition is to restrain an inferior tribunal from acting without jurisdiction or in excess of its jurisdiction. The writ will not be granted where the petitioner has an adequate remedy by review, if such tribunal should so act.

(2) Divorce. Prohibition.

Where after decision for a petitioner in divorce, and before entry of final decree petitioner filed notice of her discontinuance of the petition which the court refused to permit and respondent moved for entry of final decree which was opposed by petitioner, while the superior court has jurisdiction of the subject matter and of the parties, yet because of the peculiar nature of divorce proceedings, petitioner might be left without adequate relief by the ordinary methods to review any error of the court in entering the decree, and a petition for writ of prohibition is an appropriate medium to bring the threatened action of the court up for review.

(3) Extraordinary Writs.

Ordinarily the supreme court will restrict the use of extraordinary writs to their generally recognized offices but in any situation when no other remedy is provided it will so employ them as will most efficiently aid in the exercise of its revisory and appellate powers.

(4) Divorce.

A petition for divorce cannot be treated as an ordinary suit for the determination of rights upon adversary claims. Throughout the travel of the cause the state desires that the marriage relation shall not be dissolved and after a showing entitling a petitioner to divorce the law will not force it upon the petitioner if he does not then desire it, nor should the court listen to the guilty spouse demanding an advantage from wrong doing.

(5) Divorce. Final Decree.

It is error to enter a final decree for divorce against the wish of a petitioner in whose favor a decision has been given.

PETITION for writ of prohibition. Heard on petition for writ and granted.

SWEETLAND, C. J. This is a petition for a writ of prohibition in the above entitled cause, which cause is a petition for divorce now pending in the Superior Court. The petitioner seeks to stay that court from entering a final decree dissolving the bond of marriage between the parties.

The petition as amended prayed for an absolute divorce; it was tried before a justice of the Superior Court, and on September 27, 1921, said justice rendered his decision for the petitioner on the grounds that the respondent was guilty of extreme cruelty to the petitioner, and of neglect and refusal, being of sufficient ability, to furnish necessaries for the subsistence of the petitioner. In his decision said justice fixed the amount of alimony to be paid to the petitioner and also the amount of an allowance to her for her support pendente lite. On March 22, 1922, before the expiration of six months after said decision, during which time under our statute, a "final and operative decree" in the cause could not be entered, the petitioner filed notice in the clerk's office of the Superior Court of her withdrawal and discontinuance of the petition. That notice came before said justice and he refused to permit the petitioner to discontinue.

refusal has not as yet been brought before us for review and a consideration of its propriety is not involved in this proceeding. On March 28, 1922, after the expiration of six months from the entry of said decision the respondent moved that a final decree be entered divorcing the parties from the bond of marriage. This motion was opposed by the petitioner. After hearing, said justice announced that he should grant the motion and enter final decree but that he would not do so until the petitioner should have had an opportunity to question, before this court, the propriety of his intended action. The petitioner thereupon commenced this proceeding, asking for a writ of prohibition against said justice.

The ordinary office of a writ of prohibition is to restrain (1) an inferior tribunal from acting without jurisdiction or in excess of its jurisdiction. The position of this court has been that it would not grant the writ when it appeared that a petitioner had an adquate remedy by review, if such tribunal should so act. In this case the Superior Court has jurisdiction of the subject matter and of the parties. intended action of the Superior Court may be erroneous but it can not properly be said that the court is about to act without jurisdiction or in excess of its jurisdiction. however, it would be error to enter a final decree and the Superior Court should take that action, then, because of the peculiar nature of divorce proceedings, the petitioner might be left without adequate relief by the ordinary methods for review: In Fidler v. Fidler, 28 R. I. 102, this court has held that an appeal does not lie from a final decree for divorce; and in Thrift v. Thrift, 30 R. I. 357, it was held that in divorce an exception will not lie after the entry of final decree. If said justice should enter the final decree, as he has announced, the petitioner might bring such action before us upon certiorari, but after the entry of a final decree for divorce from the bond of marriage either party may marry again, and there would be the possibility that, before this petitioner could commence proceedings in *certiorari* and serve notice of a stay, the respondent might contract a new marriage and the rights of a third party arise, affecting the relief which would be given to this petitioner, even though the action of the Superior Court should be regarded as erroneous. *Fidler* v. *Fidler*, *supra*.

Under the provisions of Section 2, Chapter 272, General Laws, 1909, carrying out the provisions of the constitution. this court among other things has general supervision of all courts of inferior jurisdiction to prevent and correct errors and abuses therein, when no other remedy is expressly provided, and may issue extraordinary and prerogative writs, including that of prohibition, necessary for the furtherance of justice and the due administration of the law. Under its authority to frame and issue such writs and processes as may be necessary or proper to carry into full effect all the powers and jurisdiction which shall be conferred upon it (Section 6, Chapter 274, General Laws, 1909), this court has held that it "is not confined to any narrow technical definition of the office of extraordinary writs but may use those writs in their accepted form when adapted to the purpose sought." Hyde v. Superior Court, 28 R. I. 204. Ordinarily this court will restrict the use of those writs to their generally recognized offices, but, in any situation, when no other remedy is provided it will so employ them as will most efficiently aid in the exercise of its revisory and appellate powers. We are of the opinion that in the circumstances, in view of the peculiar nature of practice in divorce, the petition for the writ is an appropriate medium to bring the threatened action of said justice before us. that we may consider whether such action would be erroneous.

Marriage and the family relation is regarded as one of the foundations of our social order. To many in our community the contract of marriage is a solemn obligation requiring the sanction of religion and one which should not be dissolved save for the gravest reasons. Our law has prescribed certain formalities for the establishment of the marriage relation which are intended, among other things,

to emphasize its serious character. When the marriage relation is established, the state is deeply interested in its continuance. In his supplementary brief the respondent takes exception to the statement made at the hearing: that divorces are not favored in the law, and calls our attention to the fact that they are expressly permitted under our statute. The two statements exactly declare our law and public policy. The state strongly desires a continuation of the marriage relation, and hence is unfavorable to divorce; when however one of the parties has been guilty of serious fault, subversive of the marriage and the other is entirely blameless, then the law will permit a divorce, but upon the prayer of the innocent spouse only; and although the guilt of the other is clearly shown a divorce will not be granted if there has been a condonation of the offence. In many of its aspects a proceeding for divorce is sui generis. In the ordinary civil action the state provides a forum for the adversary parties; it endeavors to see to it that the proceedings are carried on in accordance with law; and for the good order of society it seeks to have justice done; but it has no vital interest in the outcome. It permits judgments by default, it recognizes the equal privilege of either party to have the final decision ripen into a judgment which shall conclusively establish his rights in the matter in controversy. A petition for divorce, however, seeks to set aside a relation which the state desires shall continue for the good of society. In every proceeding for divorce the state is a party and the action has been called "a triangular suit," with the interests of the state under the protection of the court. Berger v. Berger, 44 R. I. 295. The state will not permit a divorce to be granted by default nor upon admissions of the respondent made in the pleadings; but only upon affirmative convincing evidence that the petitioner is without fault and that the respondent has been guilty of an offence which is destructive of the marriage contract. After evidence warranting a decision in favor of the petitioner the court may not enter a final and operative decree until six months after

the decision. There are a number of apparent causes for this extended delay, among which some courts, with reason, have seen a purpose to give further opportunity for condonation and for reconciliation. The petitioner gives as a reason for not desiring the entry of final decree that she is willing to condone the respondent's offences, and hopes, if the marital relation be permitted to continue, that there will be a reconciliation between the parties. In this, the respondent's counsel doubts the good faith of the petitioner. The court would not question, nor pass upon her sincerity, in taking this position, which is in accord with that of the state.

The respondent is at fault in asking us to treat a petition for divorce as an ordinary suit for the determination of (4) rights upon adversary claims. We must apply the principles which pertain to this peculiar proceeding. out the travel of the cause the state desires that the marriage Nevertheless it will grant a relation shall not be dissolved. divorce to a party without fault, who has shown a marital situation to exist which such party should not be required longer to endure. Even after that showing, the law will not force a divorce upon a party entitled to it under the statute, if he does not then desire it. Nor should the court listen to the guilty spouse demanding an advantage from wrong doing. From these principles the rule arises that it is error to enter a final decree for divorce against the wish of a petitioner in whose favor a decision has been given. Some courts have held, and we think with reason, that a respondent should not be required to remain indefinitely in the uncertain condition which arises when a decision for divorce has been entered and six months have elapsed and the petitioner refuses to ask for the entry of a final decree. In such circumstances the court will require the successful petitioner, after a reasonable time, either to consent to the entry of a final decree or to withdraw the petition for divorce.

In his supplemental brief the respondent states that in a number of instances the Superior Court has entered a final decree for divorce upon motion of the respondent and over

the objection of the petitioner. The respondent urges: if we hold that the Superior Court should not enter a final decree in this case, as it purposes to do, then all the decrees which that court has entered in similar circumstances in the past would be made void, marriages contracted by the parties after such decrees would become unlawful, children of such marriages would be rendered illegitimate and "property rights, contractual rights and all other human relationship based in law upon the existence of such decrees be null and void." In this the respondent overlooks the distinction between the action of a court which is erroneous. and one taken by a court without jurisdiction. If any decree has been entered in the past, as the respondent states, and no proper action has been taken to set it aside as erroneous, it is not now properly the subject of attack because entered contrary to the wish of a petitioner who had obtained a decision on the merits. Our determination adverse to the respondent will not produce the unfortunate results which the respondent has forecast.

The petition is granted. A writ of prohibition will issue commanding the Superior Court to refrain from entering a final decree divorcing the parties from the bond of marriage upon the motion of the respondent, contrary to the wish of the petitioner.

James G. Connolly, for petitioner.

Laurence F. Nolan, Fitzgerald & Higgins, John J. Fitzgerald, William H. Camfield, for respondent.

AQUIDNECK NATIONAL BANK OF NEWPORT, R. I. vs. RICHARD W. JENNINGS, Gen. Treas.

JULY 6, 1922.

PRESENT Sweetland, C. J., Vincent, Stearns, Rathbun, and Sweeney, JJ.

(1) National Banking Act. Power of National Bank to Act in Fiduciary Capacity.

Under the Federal Reserve Act power was granted to a National Bank "to act . . . as trustee, executor, administrator and registrar of stocks and

bonds in so far as the exercise of such power is not in contravention of state or local law,"

- Held, that the exercise by a National Bank of the fiduciary powers enumerated in the permission of the Federal Reserve Board, was in contravention of the laws of this State.
- (2) National Banking Act. Federal Reserve Act. Power of Congress to control construction of state laws.

The amendment by Congress of the Federal Reserve Act in 1918 providing that "whenever the laws of such state authorize or permit the exercise of any or all of the foregoing powers by state banks, trust companies or other corporations which compete with national banks, the granting to and the exercise of such powers by national banks shall not be deemed to be in contravention of state or local law within the meaning of that act," must be assumed as intended as the legislative construction which Congress placed upon the provisions of its own act, for the power of Congress to control a state court in the construction of the laws of its state, cannot be admitted.

(3) National Banking Act. Federal Reserve Act. Mandamus. State Officers.
Without the sanction of the general assembly, the duties of a state officer are not to be extended through the provisions of an act of congress.

Mandamus. Heard on demurrer to petition and demurrer sustained. Petition for writ denied and dismissed.

SWEETLAND, C. J. This is a petition for a writ of mandamus to compel the respondent as General Treasurer of the State to accept from the petitioner forty-five thousand dollars in United States Fourth Liberty Loan Bonds, which the petitioner has tendered as security for the performance of its duties in a fiduciary capacity in accordance with what it alleges are the provisions of the Federal Reserve Act.

The Attorney General of the State in behalf of the respondent has demurred to the petition.

The petitioner alleges that it is a banking corporation organized under the National Bank act of Congress, engaged in a general banking business in Newport as authorized by its charter; that under the authority of the act of Congress known as the Federal Reserve act the Federal Reserve Board granted to the petitioner the right "to act . . . as trustee, executor, administrator and registrar of stocks and bonds in so far as the exercise of such power is not in

contravention of state or local law;" that said Federal Reserve act provides as follows: "whenever the laws of a state require corporations acting in a fiduciary capacity to deposit securities with the state authorities for the protection of private or court trusts, national banks so acting shall be required to make similar deposits and securities so deposited shall be held for the protection of private or court trusts as provided by the state law;" that under the provisions of Section 7, Chapter 231, General Laws of Rhode Island, 1909, every trust company is required to deposit with the General Treasurer of the State in certain securities therein specified, which include the bonds of the United States, "an amount that shall be at all times equal in value to twenty per centum of the entire capital stock of said corporation which bonds shall be held by said treasurer as an additional security for the faithful performance by said corporation of its duties as trustee, executor, custodian, conservator, guardian, assignee or receiver;" that the entire capital stock of the petitioner is two hundred thousand dollars and that it tendered forty-five thousand dollars in said Liberty Loan Bonds to the General Treasurer to be held by him as additional security for the faithful performance by the petitioner of those duties in a fiduciary capacity which it is empowered to assume by the grant of the Federal Reserve Board; that the respondent as General Treasurer has refused to receive said bonds of the petitioner.

The respondent's demurrer sets forth several grounds which in substance are (1) that the exercise by the petitioner of the fiduciary powers enumerated in the permission of the Federal Reserve Board is in contravention of the laws of this state; (2) that the acceptance of the proposed deposit by the General Treasurer would be in contravention of the laws of the state; and (3) that, upon said petition this court should not by a writ of mandamus compel the respondent to perform acts which do not fall within the respondent's powers or duties under the laws of this state.

The provisions of the Federal Reserve act giving to the Federal Reserve Board power to authorize a national bank to act as an executor or trustee was looked upon by some as a further step by Congress in what has been regarded as its tendency to legislate in matters of purely local and state (1) concern. The legislature of New Hampshire met the situation by providing that no trust company, bank or banking company or similar corporation, should thereafter be appointed administrator of an estate, executor under a will. guardian or conservator of the person or property of another; and the Supreme Court of that state has held that national banks as well as state corporations were included within the prohibition of that legislative act. Appeal of Woodbury, 96 Atl. 299. The provision in question came before the Supreme Court of Illinois, in People v. Brady, 271 Ill. 100. That court held that the implied power of Congress under the constitution to create national banks as governmental agencies, declared in McCulloch v. Maryland. 4 Wheat. 316, and Osborn v. United States Bank, 9 Wheat. 738, did not extend to the power of authorizing such banks to act as trustees, or the personal representatives of de-The court further held that such permission to a cedents. national bank was in contravention of the laws of Illinois, which had designated the corporations which could act in a fiduciary capacity and had especially provided for state examination as to their financial stability and for their control. In Attorney General v. National Bank, 192 Mich. 640, it appeared that the First National Bank of Bay City had been granted by the Federal Reserve Board the power to act in a fiduciary capacity. The proceeding was in the nature of quo warranto questioning the right of said national bank so to act. One member of the court was of the opinion that the exercise of the granted powers was in contravention of the laws of Michigan, relative to the settlement of the estates of deceased persons. A majority of the court, however, held that the authority given by the Federal Reserve Board to the respondent national bank did not

contravene the Michigan law, but that the grant of authority to a national bank to act in a fiduciary capacity in accordance with the provisions of the Federal Reserve act was beyond the express or implied powers of Congress, was repugnant to the Federal Constitution; and that the respondent bank was without legal authority so to act within the state of Michigan. This case was reviewed by the United States Supreme Court upon writ of error to the Supreme Court of Michigan in First National Bank v. Union Trust Company, 244 U.S. 416. It was there held that the authority of Congress to give to national banks power to act as trustees, etc., was within the doctrine stated by Chief Justice Marshall in McCulloch v. Maryland, supra, and Osborn v. Bank, supra, and the grant of such power was not in violation of the United States Constitution; that as a majority of the Supreme Court of Michigan to whom was given the power to construe the laws of Michigan, had decided that the exercise of the power conferred upon the national bank was not in contravention of the state law, the court reversed the judgment of the Supreme Court of Michigan.

The final determination as to the constitutionality of an act of Congress rests in the United States Supreme Court and no question can now be raised before us as to the constitutional validity of the provisions of the Federal Reserve There is left to us to consider act under consideration. whether the exercise of the powers which the permission of said board purports to give to the petitioner is in contravention of the laws of this state.

The first corporation empowered to act as trustee, executor, administrator or guardian in this state was chartered in Stringent regulations were contained in its charter to secure the faithful performance of its duty in such capacity and to safeguard the interests of beneficiaries under such trusts. These provisions for the protection of trust funds are now embodied in a general statute, sections 4-8, Chapter 231, General Laws, 1909. Under the pro-

visions contained in section 6 of the chapter the assets of every trust company, equal in value to the par value of its capital stock, shall stand pledged and shall be considered as the security required by law for the faithful performance of its duties as trustee, executor, administrator, guardian, etc., and for the protection of deposits made with it by other In case of loss any person beneficially entitled to said estate and any trustee making such deposit shall be first indemnified in full from such amount so pledged in preference to all other creditors. Under Section 7 said trust company is required to deposit with the General Treasurer securities of the kind therein enumerated in an amount equal in value to twenty per centum of the entire capital stock of said corporation, which securities shall be held by said treasurer as an additional security for the faithful performance by said corporation of its duties as trustee, executor, custodian, guardian, etc., and for the repayment of monies deposited with it by other trustees: and the parties intended to be secured by such deposit shall in case of loss be first fully indemnified out of such deposit in preference to all other creditors of said corporation. Solely because of the security thus provided such trust companies are permitted to act in a fiduciary capacity and to accept and execute the office of executor, administrator. guardian, etc. State banks, savings banks, and all other corporations within the state, are excluded from the exercise of such powers.

It was pointed out in the opinion of the United States Supreme Court in First National Bank v. Union Trust Co., supra, that the general subject of regulating the character of the business of corporations acting in a fiduciary character is peculiarly within state administrative control and if not discriminatory or unreasonable would be controlling upon banks created by Congress when they seek to exercise such fiduciary power. The provisions of our law with reference to trust companies, safeguarding the rights of beneficiaries, were in our statute law many years before the

passage of the Federal Reserve act. They can not be considered as discriminatory against national banks for banks of this state which come into competition with trust companies as well as with national banks are excluded from such privileges; nor can they be considered as unreasonable since such provisions have a just relation to the financial stability properly to be required of a trustee. Hence in the language of the Federal court such regulation would be controlling upon national banks. National banks do not and can not comply with these regulations. The assets of this petitioner to the amount of two hundred thousand dollars, which is the par value of its capital stock, can not under the provisions of its charter and the national banking law stand pledged for the faithful performance of its duties as trustee, executor, administrator, etc., and for the security of deposits made with it by other trustees, and in case of loss the beneficiary or the trust depositor can not be first indemnified in full from the amount pledged in preference to all other creditors. If it were a trust company, the securities equal to twenty per centum of its capital stock, which the petitioner is seeking to deposit with the General Treasurer, would be a deposit which it would be required to make merely as an addition to the security furnished under the provisions of Section 6. In this regard we are of the opinion that it would be in contravention of our state law for this court to take action which should apparently admit this petitioner to a standing of equality with trust companies; treating it as a corporation which furnished a similar security to beneficiaries and had equal authority to act in a fiduciary capacity.

The devolution of the estates of decedents, the control of the property of infants and lunatics, the jurisdiction of our probate courts, and the legal regulation of the trusts which arise in the administration of probate law are matters which pertain exclusively to the powers of a state over its domestic affairs. Under the state law no corporation other than a trust company, organized under the Rhode Island statute,

may be appointed executor, administrator or guardian by our probate court or may accept and execute the duties of such office. This authority is not conferred upon a trust company because it is a banking institution, as state banks. which in the nature of their business are similar to national banks are not given such powers, neither are savings banks. The extension by the General Assembly of this power to trust companies, alone of all corporations, is plainly because the provisions governing their creation and their regulation safeguard in a peculiar manner the legal rights of those beneficially interested in such trusts. In the absence of the express sanction of the General Assembly the appointment of a national bank to execute the trusts which arise in probate proceedings, or the attempted execution of such trusts by a national bank, would be in contravention of our state law.

(2) In 1918 Congress amended the Federal Reserve act by adding the following paragraph: "Whenever the laws of such state authorize or permit the exercise of any or all of the foregoing powers by state banks, trust companies, or other corporations which compete with national banks, the granting to and the exercise of such powers by national banks shall not be deemed to be in contravention of state or local law within the meaning of that act." We assume that this amendment is intended as the legislative construction which Congress places upon the provisions of its own act, for we do not admit the power of Congress to control this court in the construction of the state laws of Rhode Island.

There is another fundamental question arising under the demurrer of the respondent, which is as to the propriety of a (3) mandatory writ of this court commanding a state officer to act outside the scope of his duties as they are set out in our law. The General Treasurer is an officer of the state provided for in the constitution. His duties are prescribed by the General Assembly. Without the sanction of the General Assembly those duties are not to be extended through the provisions of an act of Congress. Under Section 7 of

said Chapter 231, referred to above, the General Treasurer shall receive the securities which trust companies must deposit with him. These securities include certain classes of bonds, the financial obligations of cities and towns of the state, and first mortgages on improved real estate in this state of the class required for savings bank investments; as to the security last named he must take an assignment of the same and an assignment of the debts secured thereby. Section 8 of said Chapter 231 provides as follows: Upon the receipt by said general treasurer of such securities from said corporation, said general treasurer shall give to said corporation a certificate stating the securities and amount of each. Said general treasurer shall at all times pay over to said corporation the interest which may be received upon such securities, and shall at all times permit said corporation, by its treasurer or other authorized agent, to examine said securities, to receive all coupons on the same, as they shall mature, and to collect for the use of said corporation all interest due thereon or on said securities, however the same may be evidenced or secured; and shall also permit said corporation to retire any securities so deposited, on substituting therefor other securities of any or either of the classes mentioned above, to such an amount that the market value of the whole deposit shall not be less than the amount required by the provisions of the preceding section."

Even if we had found that the exercise of all the powers which the petitioner claims were conferred upon it by the Federal Reserve Board was not in contravention of state law, we should nevertheless be forced to hold that Congress can not give to the national banks in this state the right to demand that the General Treasurer shall perform for their benefit the duties enumerated in said Sections 7 and 8.

The respondent's demurrer is sustained. The petition for a writ of mandamus is denied and dismissed.

Sheffield & Harrey, for petitioner.

Herbert A. Rice, Attorney General, for respondent.

SAMUEL PALAIS vs. LOUIS DUHAMEL.

JULY 7, 1922.

PRESENT: Sweetland, C. J., Vincent, Stearns, Rathbun, and Sweeney, JJ.

(1) Landlord and Tenant. Attornment.

Whether a tenant attorned to a new landlord is a question of fact, and where it appeared that the tenant received legal advice that by paying rent to the new landlord he would waive his rights and nevertheless paid rent several times although asserting that he did not waive his rights in so doing and that the landlord at request of tenant made repairs on the premises, a finding that tenant attorned was warranted.

TRESPASS AND EJECTMENT. Heard on exceptions of defendant and overruled.

PER CURIAM. This is an action of trespass and ejectment. The case was tried by a justice of the Superior Court sitting without a jury. Said justice's decision was for the plaintiff for possession and costs. The case is before us on defendant's exception to said decision.

On January 24, 1921, the premises in question were demised by the then owner, Edmund R. Darling, by written lease to the defendant for a term of three years. The lease, which was duly recorded, contained a clause as follows: "And it is further agreed by and between the said parties that, if during the term of this lease, the lessor, his heirs or assigns, should desire to sell said demised premises, then the lessee, his executors, administrators or assigns, shall have the privilege of purchasing the same for the same price for which the lessor would be willing to sell to any other person: but, if the lessee, his executors, administrators or assigns, shall not exercise said option of purchase within ten (10) days after notice in writing from the lessor, his heirs or assigns, of such desire to sell, then this lease shall be and become void upon a conveyance of said demised premises by the lessor, his heirs or assigns."

By deed, dated October 5, 1921, said Darling conveyed said premises and also another parcel of real estate to

Abraham Dimond, et ux, without first giving the defendant the privilege of purchasing the premises in question "for the same price for which the lessor would be willing to sell to any other person." On November 9, 1921, said Dimond wrote to the defendant stating that the plaintiff had offered eight thousand dollars for said premises and that the writer was willing to sell for said sum. As the defendant did not within ten days signify his intention to exercise his option Dimond on November 23, 1921, sold said premises to the plaintiff who on the following day wrote the defendant stating that the plaintiff had purchased said premises and that, as the defendant had failed to exercise his option to purchase, said lease was terminated by the sale to the plaintiff.

The plaintiff contends that the defendant attorned to Dimond; that notwithstanding the failure of Darling to give the defendant the privilege of purchasing at the price for which Darling was willing to sell, Dimond by the conveyance from Darling coupled with the attornment, obtained a valid title to the premises, subject to said lease, and that the defendant's rights under said lease were terminated by the sale to the plaintiff after the defendant failed to avail himself of the opportunity which was given him to exercise his option to purchase.

The defendant contends that although he paid rent to Dimond he never attorned to him; that the conveyance to the plaintiff was not bona fide but was made for the fraudulent purpose of avoiding said lease and that in the consummation of the sale to the plaintiff he was given better terms than were offered to the defendant.

Whether the defendant attorned to Dimond was a question of fact. There was evidence that the defendant received legal advice to the effect that if he desired to compel specific performance he must bring a bill in equity for that purpose and not recognize Dimond as landlord and that by paying rent to Dimond the defendant would waive his right to compel specific performance. After receiving said advice

the defendant, although asserting that he did not waive his rights, made to Dimond several payments of rent as reserved in the lease. There was evidence that Dimond at the request of the defendant made repairs on the premises. Said justice found that the defendant attorned to Dimond and that the sale by Dimond to the plaintiff was not fraudulent. We think both findings were warranted by the evidence.

Did Dimond give the plaintiff better terms than were offered to the defendant? Dimond offered the premises in question to the defendant for eight thousand dollars to be paid in cash. Darling, when he conveyed to Dimond the premises in question together with another parcel of real estate, received from Dimond as a part payment of the purchase price a note for eight thousand dollars secured by a mortgage on the two parcels of real estate. When Dimond conveyed the premises in question to the plaintiff Darling released said premises from said mortgage, received from the plaintiff a note secured by mortgage for four thousand dollars on the premises in question and credited Dimond with four thousand dollars on his said mortgage note for eight thousand dollars and the plaintiff paid to Dimond two thousand dollars in cash and gave him a promissory note payable on demand for two thousand dollars, which note was paid according to the arrangement between the parties thereto on the following Monday, which was as soon as plaintiff could go to Boston to obtain the cash and return.

We think that Dimond sold to the plaintiff on substantially the same terms as were offered to the defendant. Dimond did not take a mortgage in part payment. While he did not actually receive the full amount of the purchase price in cash he was given credit for four thousand dollars on his note and received four thousand dollars in cash. Darling was apparently willing and did in effect loan the plaintiff four thousand dollars. Dimond was willing and perhaps pleased to pay a portion of his indebtedness to Darling. The loan to the plaintiff was an accommodation granted by Darling and not a concession made by Dimond.

The fact that the conveyance was not delayed one or two days to enable the plaintiff to go to Boston and get two thousand dollars is, in our opinion, of little consequence.

The defendant's exception is overruled and the case is remitted to the Superior Court with direction to enter judgment on the decision.

Charles H. McFee, James H. Rickard, for plaintiff. Eugene L. Jalbert, for defendant.

ARTHUR A. SULLIVAN vs. WALLACE BRADIC et al.

NOVEMBER 1, 1922.

PRESENT: Sweetland, C. J., Vincent, Stearns, Rathbun, and Sweeney, JJ.

(1) Mechanic's Lien. Equitable Interest in Land.

July 1, B. gave C., a contractor, money to buy a lot of land and to build a house thereon.
July 28 petitioner contracted with C. to dig the cellar.
July 30,
C. purporting to act for B. secured a permit to build whereby authority was granted to B. as owner of the land. At the time petitioner did the work,
August 1, on the cellar the land belonged to X.

August 16, deeds to the wife of C. and from her to B. were recorded.

Held, that assuming that a mechanic's lien lies on an equitable interest in real estate which is not decided, there was no evidence that B. when petitioner did the work had any title either in law or equity to the land and petitioner's claim for lien must be dismissed.

(2) Mechanic's Lien. Equitable Estoppel.

A mechanic's lien cannot be maintained on the ground of an equitable estoppel, arising out of the description of respondent as owner of the land in a building permit, when an examination of the records would have disclosed the true ownership and no representations were made to petitioner by respondent or by anyone authorized by him.

MECHANIC'S LIEN. Heard on appeal of petitioner from decree of Superior Court and decree affirmed.

STEARNS, J. The original proceeding was by a petition to enforce a mechanic's lien. This petition was denied by the Superior Court and the cause is now in this court on the appeal of the petitioner from this decision.

From the evidence, which is brief and fragmentary, it appears that on July 1, 1921, respondents gave to one Budlong, a contractor, \$1,200 with which to buy for them a lot of land on Bellevue avenue in the city of Providence and to build a house thereon. On the 28th of July petitioner Sullivan, by a written contract with Budlong, agreed to excavate the cellar and lay the foundations for the house to be erected on Bellevue avenue, to commence the work August 1st and to complete the same by August 13th. was completed substantially as agreed. On July 30th, Budlong, purporting to act as agent for the respondents, made application to the Inspector of Buildings for a permit to build; on the same day a permit to build was issued to Budlong, whereby authority to build was granted to Wallace and Rose Bradic as owners of the land. Budlong notified respondents that he had secured the permit, and respondent Rose Bradic testifies that he had their authority to secure the permit. Petitioner Sullivan on receipt of this permit from Budlong began the work August 1st on the excavation of the cellar for which he now claims a lien. At this time the land in question belonged to the heirs of one Mary J. Lapham. Neither Budlong nor the respondents had any title to the land or any agreement with the owners for a convevance of the land. On the 12th of August respondents. who were suspicious of the good faith of Budlong, threatened to take legal proceedings unless they received a deed to the There is no evidence of an actual delivery of the Three deeds from the different heirs, each dated July 14, and one acknowledged as late as August 11, 1921, conveying the land in question to Lucy A. Budlong, wife of the said Budlong, were introduced in evidence, also a deed of the land in question from Lucy A. Budlong to respondents, dated and acknowledged August 15, 1921, and placed on record August 16th together with the deeds above mentioned to Lucy A. Budlong. Neither Lucy A. Budlong nor her husband Carl were called as witnesses and no reason was given for the failure to produce these witnesses.

spondents expected the deeds to be made to them directly and there is no evidence of the terms or nature of the transactions evidenced by the deeds other than the deeds. claim is made, with some probability, that Mrs. Budlong was acting for her husband and that they took advantage of the respondents by charging them more for the land than they were required to pay for it, and the amount of the revenue stamps affixed to the deeds appears to give color to the claim. But the evidence is insufficient to warrant any legal conclusion in regard to the facts. On August 31, the petitioner served notice on the respondents of a lien for labor and materials furnished upon the house on land owned by them. Petitioner does not and can not claim that respondents were the legal owners of the land at the time of the inception of the alleged lien on August 1st. But the claim is that respondents were the equitable owners at that date and consequently that a lien attaches to the land, on the ground that they were the owners in equity. Assuming that a mechanic's lien lies on an equitable interest in real estate, although we do not now mean to pass on this question, there is no evidence to show that respondents on August 1st had any title, either in law or equity, to the land and consequently petitioner's claim based on this alleged ownership of the land must be denied. Chace v. Pidge, 21 R. I. 70; Hawkins v. Boyden, 25 R. I. 181.

Petitioner also claims a lien on the ground of an equitable estoppel. The ground alleged is that Budlong acting as the agent for respondents by presenting the permit to build in which respondents are described as owners of the land thereby made a false representation as to ownership whereby respondents are bound and are in equity estopped to deny the truth thereof. There is no merit in this contention. Any examination of the public records would have disclosed at once the fact that respondents were not the owners of the land. Respondents claim that the contractor Budlong did not act in good faith in securing title for them and that it was only by threat of legal proceeding that they finally

secured title to the land on which their house was in process of construction. So far as appears they did not make any representation to petitioner in regard to ownership of the land nor did they authorize the contractor Budlong to make any such representation. In the circumstances if petitioner was misled as to the ownership, his mistake arose from his own neglect and failure to ascertain facts which could easily have been ascertained, and not to any false representation made by respondents. There is no basis for the claim of an estoppel.

The petitioner's appeal is denied; the decree of the Superior Court appealed from is affirmed and the cause is remanded to the Superior Court for further proceedings.

James O. McManus, Edward F. McElroy, Joseph W. Grimes, for petitioner.

Ernest P. B. Atwood for respondent.

Rosa M. Enos vs. Manuel Enos.

NOVEMBER 17, 1922.

PRESENT: Sweetland, C. J., Vincent, Stearns, Rathbun, and Sweeney, JJ.

Gen. Laws, 1909, cap. 247, § 14, confers authority upon the court to regulate the custody and provide for the education, maintenance and support of children of all persons by it divorced, and the court is not limited as to time and may entertain a motion for custody and support after entry of final decree.

DIVORCE. Heard on respondent's appeal from decree awarding custody of minor child and support. Appeal dismissed.

SWEENEY, J. This cause is before the court on the respondent's appeal from a decree of the Superior Court entered May 7, 1921, whereby the custody of a minor child of the parties was awarded to the petitioner and the respondent was directed to pay her \$3.50 each week for the support of said child until further order of court, and denying his motion for the custody of said child.

The record shows that June 1, 1917, the petitioner filed her petition asking for a limited divorce from the respondent, the custody of their two children, and for alimony. January 9, 1920, the respondent filed a motion in the nature of a cross-petition praying for an absolute divorce from the petitioner. April 8, 1920, after a trial, decision was entered granting the respondent an absolute divorce from the petitioner on the ground of desertion and denying her petition for a limited divorce. Final decree was entered in accordance with this decision October 13, 1920, and within one month thereafter the respondent again married. During the pendency of the divorce proceedings the court awarded the custody of the children to the petitioner and ordered the respondent to pay her for their support. Upon the entry of the final decree these payments ceased although the children continued to live with the petitioner. Since then the petitioner has provided for their support and upon the death of one of them paid the funeral and other expenses.

April 13, 1921, the petitioner filed a motion in the Superior Court stating that their child was residing with her and praying that the court order the respondent to pay her a reasonable sum for its support and maintenance. The respondent filed a cross-motion asking for the custody of said child and after a hearing upon these motions a decree was entered granting her motion and denying his.

The respondent has duly prosecuted his appeal to this court from this decree and states as reasons therefor that said decree is against the law because the Superior Court was without jurisdiction in the premises and that it was error to grant the custody of the child to the mother.

In this state jurisdiction in divorce proceedings is purely statutory, Leckney v. Leckney, 26 R. I. 441; Sammis v. Medbury, 14 R. I. 214, and our statute, Section 14, Chapter 247, General Laws, 1909, provides, among other things, that the "court may regulate the custody and provide for the education, maintenance, and support of children of all persons by it divorced . . . and may make all necessary orders and decrees concerning the same."

The respondent claims that, because final decree was entered in the Superior Court granting his cross-motion for an absolute divorce and denying her petition for a limited divorce before the filing of her motion for the custody of their child and allowance for its support, said court is without jurisdiction to grant said motion.

This claim is untenable as express authority is given by **(1)** the law above quoted authorizing the court to provide for the support of children of all persons by it divorced and to regulate the custody thereof. No limitation as to the time within which such matters must be brought before the court for settlement being contained in the statute, and there being no previous adjudication of the matter of the custody of the child and support thereof, this court is of the opinion that the Superior Court had jurisdiction to enter the decree appealed from. Similar claims have been made against the jurisdiction of the Superior Court to enter decrees allowing alimony upon claims therefor presented after the entry of final decrees and such claims have not been allowed. Phillips v. Phillips, 39 R. I. 92; Wilford v. Wilford, 38 R. I. 55; Warren v. Warren, 36 R. I. 167.

The respondent's claim that the court erred in granting the custody of the child to the petitioner cannot be sustained because, after a careful reading of the transcript of testimony, there appears to be no abuse of judicial discretion in awarding the custody of the child to her. The testimony shows that she has had the custody of the child ever since she filed her petition for divorce, June 1, 1917. It was admitted that she provided a good home for it. The respondent was apparently willing that she should retain the custody of the child so long as he was not required to contribute towards its support. It is only right that he should contribute towards the support of his child and no claim is made that the sum he has been ordered to pay is unreasonable.

The respondent's appeal is dismissed, the decree of the Superior Court appealed from is affirmed, and the cause is remanded to that court for further proceedings.

Cooney & Cooney, for petitioner. Rosenfeld & Hagan, for respondent.

Edith G. Powell, p. a., vs. Jeremiah F. Gallivan et al. DECEMBER 1, 1922.

PRESENT: Sweetland, C. J., Vincent, Stearns, Rathbun, and Sweeney, JJ.

- (1) Evidence. Res gestæ.
- A statement made by a child two and a half years of age immediately after the happening, that defendant's dog had bitten her, the statement appearing to have been spontaneous and not premeditated, was admissible as a part of the transaction.
- (2) Evidence. Res gestæ. Evidence of Child.
- The fact that a child is too young to be a competent witness, does not preclude the admission in evidence of its declarations as part of the res gestæ.
- (3) Exceptions.
- An exception cannot be sustained where no objection was made to the question and no motion was made to strike out the answer and it does not appear from the record whether the exception was to the question or answer.
- (4) New Trial.
- All grounds contained in the motion for new trial should be considered by the trial justice, but where the appellate court does not have the benefit of the opinion of the trial court on the ground of liability, the fact that he approved the amount of damages awarded by the verdict warrants the inference that he approved the verdict on the ground of liability.

TRESPASS ON THE CASE. Heard on exceptions of defendant and overruled.

Sweeney, J. This action of trespass on the case is brought to recover damages for injuries sustained by the plaintiff on account of being bitten by a dog. The defendants are husband and wife and at the close of the testimony a verdict was directed for the wife. The question of the liability of the husband was submitted to the jury and a verdict was returned against him. A motion for a new trial was then made and after the motion was denied he brought the case to this court upon his bill of exceptions.

The testimony shows that August 15, 1919, the defendant and his wife owned a two-family house in the city of Providence and occupied the lower tenement thereof, and that the plaintiff, then about two and one-half years old, was living with her parents in the upper tenement of said house.

It appeared in evidence that the defendant owned a dog called "Joe" and that the plaintiff could talk, and the defendant's daughter testified that she had seen the plaintiff play with the dog and had heard her call it "Joe."

The plaintiff's mother testified that late in the afternoon of August 15, 1919, she put the plaintiff in the yard to play, that the gate opening into the street was hooked, and that she did not then see the defendant's dog. She then returned upstairs and during the next half hour frequently looked through an open window to see her child, and saw her digging with a spoon under a grapevine. She also testified that the last time she looked through the window she saw the defendant's dog in the yard, near the door, and about five or six steps from the grapevine. About five minutes thereafter she heard the dog growl and the child scream and she ran down the stairs and found the child on the walk. almost in front of the steps, with blood on her face and screaming. She immediately picked up the child and brought her upstairs and treated her. She further testified that as she reached the place where the child was she saw the defendant's dog about two steps from the child and it (1) ran around the corner towards the backyard. testified that when she picked up the child it immediately said to her, "Naughty-Mamma-Joe, he knocked me down, he bit me here and here and here."

The defendant objected to the admission of the statement of the child in evidence and now claims that it was error to permit the witness to testify to the statement upon the ground that it was not a part of the res gestæ.

The statement of the child was made so quickly after the attack upon her that it is in the limit of time within which statements must be made to be admissible as part of the res gestæ. The statement related to the cause of the injuries from which she was suffering; it appears to be spontaneous and not premeditated; and it was made so promptly and naturally after the attack upon her that it belonged to and was a part of the transaction, and was therefore ad-

missible as a part of the transaction. State v. Murphy, 16 R. I. 528.

The defendant also claims that inasmuch as the child was not of sufficient age to be sworn as a witness her statement was not admissible in evidence as a part of the res gestæ. This claim cannot be allowed for the law is well settled that when statements made by a child form part of the res gestæ their admissibility is allowed on the ground that they derive their force from the circumstances under which they (2) were uttered and do not rest upon the credit of the maker; and that res gestæ evidence is not the witness speaking, but the transaction voicing itself. Kenney v. Texas, 65 L. R. A. 316, and note p. 318.

It has been held that the fact that a child is too young to be a competent witness because of inability to comprehend the obligation of an oath does not preclude the admission in evidence of its declarations as part of the res gestæ. State v. Lasecki and note, 57 L. R. A. (N. S.) 202.

The defendant claims an exception to the admission of testimony showing that he muzzled the dog after its attack upon the plaintiff. The plaintiff's father had testified that a sign, "Beware of the dog," was put on the fence or in the vard three days before his child was bitten. He was then asked, in direct examination, "Q. And do you know whether or not the dog was muzzled sometime—about the same time the sign was put up there? A. He was. THE COURT. We are in the same position as to time, exactly,—if it is not connected up. Defendant's exception noted." This exception cannot be sustained. No objection was made to the question and no motion was made to strike out the answer. It does not appear from the record whether the exception is 3) to the question or to the answer. The inference from the testimony is that the muzzle was placed upon the dog before the child was bitten and, this being so, the answer should stand. But, as the witness testified in cross-examination that the muzzle was placed on the dog the day after the attack, the defendant then should have made a motion to strike out the testimony on direct examination relating to the muzzling of the dog if he wished to bring before this court his objection to the admission of such testimony. State v. Pesce, 112 Atl. Rep. 899.

The defendant has an exception to the decision of the trial justice denying his motion for a new trial. The motion alleged that the verdict was contrary to the evidence and the weight thereof, and that the damages awarded were excessive. The trial justice in denying this motion filed a rescript in which he said, "No ground other than that the verdict was excessive was considered by the Court." After a discussion of the testimony relating to the injuries, he said, "the verdict is not excessive. Motion for a new trial denied and dismissed."

The statute provides, among other things, that motions for a new trial shall be heard and decided by the justice who presided at the trial, Section 16, Chapter 298, General Laws, 1909, as amended by Chapter 436, Public Laws, 1909. The duty of the trial justice in hearing and deciding a motion for a new trial, and the force and effect which will be given by (4) this court to his decision on such a motion, has been clearly stated in the cases of Surmeian v. Simons, 42 R. I. 334, 337, and Bova v. Scorpio, 43 R. I. 98.

Both parties to the cause are entitled to have the opinion of the trial justice upon all of the grounds contained in the motion for a new trial and this court should also have the benefit of the opinion of such justice in the event that the cause is brought here on exceptions.

The defendant now claims that this court should hear and determine his claim that the verdict is against the weight of the evidence inasmuch as the trial justice made no decision thereon. The rule of law, applying in these circumstances and which controlled the granting of petitions for new trials prior to the establishment of the Superior Court in 1905, is that where the evidence as to the existence of the facts which are put in issue is conflicting and is of such a character that fair-minded men might honestly differ as to the result thereof

the verdict of the jury is final and conclusive; and under the decision of our court in the case of *Johnson* v. *Blanchard*, 5 R. I. 24, (which has been repeatedly reaffirmed) a verdict cannot be set aside unless the evidence "very strongly preponderates against it." *Hehir* v. R. I. Co., 26 R. I. 30; *Buttera* v. R. I. Co., 110 Atl. Rep. 71.

The testimony in this case is conflicting on the essential element of whether the defendant knew that the dog was vicious. The testimony for the plaintiff is to the effect that the dog had attacked five different persons and that each of these attacks was called to the attention of the defendant. and the defendant denies that complaints were made to him of attacks by the dog or that he knew the dog was vicious, and he introduced testimony tending to show that his dog was of a peaceful disposition. The plaintiff's father and another person testified as to a conversation with the defendant in which he admitted knowledge of the dog's previous attack upon the plaintiff, and the defendant denied making any such admission. Apart from the statement of the child that the dog made the attack upon her, the evidence as to the attack was circumstantial, but there was no testimony to show any other cause of the wounds on her face. There is no testimony of any other dog having been seen in the yard about the time the plaintiff received her injuries, and the physician who treated her that night testified that her wounds were such as could be made by the bite of a dog. On this conflicting evidence the defendant's motion to direct a verdict in his behalf was properly denied.

The trial justice charged the jury that in order for the plaintiff to recover she must show by a preponderance of the evidence that the defendant knowingly kept a vicious dog and that the dog did actually attack her, and if the jury were not satisfied that the defendant had such knowledge and that the dog did attack the plaintiff then their verdict must be for the defendant. No exception was taken to the charge and the law of the case being as thus stated the approval by the trial justice of the amount of damages

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awarded by the verdict warrants the inference that he approved the verdict on the ground of liability. The plaintiff has introduced positive and substantial testimony tending to prove all of the necessary elements in her case. The defendant has introduced testimony to the effect that the dog was a gentle one and that he did not know of its having any vicious propensities. The court has carefully considered all of the testimony and, as it cannot say that the testimony for the defendant "very strongly preponderates" against the verdict, the exception that the verdict is against the weight of the evidence is overruled. The other exceptions of the defendant were not briefed nor argued and are considered waived.

All of the defendant's exceptions are overruled and the case is remitted to the Superior Court with direction to enter judgment for the plaintiff upon the verdict.

John L. Curran, for plaintiff.

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William S. Flynn, Edmund W. Flynn, for defendant

MILBURY ATLANTIC MANUFACTURING Co. vs. Rocky Point Amusement Co.

DECEMBER 5, 1922.

PRESENT: Sweetland, C. J., Vincent, Stearns, Rathbun, and Sweeney, JJ.

- (1) Judgments. Default. Removing Default.
- During six months after judgment by default the jurisdiction to grant relief is concurrent in the Supreme Court and the Superior Court or any district court in which such judgment has been entered.
- (2) Judgments. Removing Default.
- A petition to remove default is addressed to the judicial discretion of the court and upon review the determination of an inferior court will not be disturbed unless it appears that there has been an abuse of discretion or that the determination is based upon an error of law.
- (3) Judgments. Removing Default. Statement of Defence.
- In granting relief after default the remedy will be withheld unless the party as a part of the cause shown, makes it appear, if he be a defendant, that he has a defence which he desires to present in good faith in case a trial is granted and that it is one which if established should have an effect upon the result. It should appear that the defence is prima facie meritorious.

(4) Removing Default.

It is the duty of a court in passing on a petition to remove a default, to determine whether or not the defence urged is frivolous or one that amounts to a defence in law, and whether or not it is being urged in good faith and the court should not pass upon the sufficiency of the evidence to support the defendant's claim.

AFTER JUDGMENT BY DEFAULT. Heard on exception of defendant and overruled.

SWEETLAND, C. J. The above entitled case is before us upon exceptions to the action of the Superior Court denying the defendant's motion "that the default be removed and said case reinstated for trial."

It appears from the record in this cause that in the Superior Court on March 20, 1922, the defendant was called and defaulted, and on the same day judgment was entered for the plaintiff upon said default. On the following day the defendant filed the motion now under consideration which was denied by the Superior Court, to which action the defendant excepted. We assume that by said motion the defendant sought to avail itself of the relief afforded by Section 2, Chapter 294, General Laws, 1909, which section provides that in case of judgment by default the court entering the same shall have control over the same for the period of six months after the entry thereof and may for cause shown set aside the same and reinstate the cause.

(1) The power conferred on the courts in this section is in its nature, and in regard to the restrictions which should govern its exercise, identical with the power given this court to grant a trial in the Superior Court or in any district court under the provisions of Section 1, Chapter 297, General Laws, 1909. During six months after judgment by default the jurisdiction to grant relief is concurrent in this court and the Superior Court or any district court in which such judgment has been entered. Curry v. Swett, 13 R. I. 476; Kinkead v. Keene. 22 R. I. 336; Cascia v. Gilbane, 26 R. I. 584. The petition preferred under either section is addressed to the judicial discretion of the court. Upon review

(2) this court will not set aside the determination of an inferior court upon such a petition unless it appears that there has been an abuse of discretion or that the determination is based upon an error of law. Fox v. Artesian Well & Supply Co., 34 R. I. 260; Bank v. Inman, 34 R. I. 391.

An examination of the record of the proceeding in the Superior Court upon this motion shows no abuse of the discretion of that court. The finding of said justice was justified, that the defendant had failed to present adequate cause for setting aside the judgment by default. The plaintiff claimed before us that the defendant was

without standing upon its motion, because it did not

accompany the same with an affidavit setting out the defence which it was prepared to present in case there should be a reinstatement of the cause. It appeared in the argument before us, and also in the record of the proceedings below. that the practice in the Superior Court upon petitions for relief under said section has been affected by a misinterpretation of the opinion of this court in Bank v. Inman, 34 R. I. 391. We have held that "the remedy which a party has after default is only incidentally dependent upon the merits of his case." In re Stillman, Petitioner, 28 R. I. The position of the court has been, however, that the remedy will be withheld unless the party, as a part of the cause shown, makes it appear, if he be a defendant, that he has a defence which he desires to present in case a trial is granted, and that it is one which, if established, should have an affect upon the result. This principle was recognized in Draper v. Bishop, 4 R. I. 489, and since that case it has governed the practice in this court. We have always regarded the statement of defence as an appropriate, if not necessary, allegation of a petition for relief. We would not prescribe the form of petition to be entertained in the Superior Court. We think, however, as has been the practice here, that before relief is granted by that court it should be made to appear that the petitioner has a defence which is prima facie meritorious, and which in good faith he

desires to present at the trial if one be granted to him. Bank v. Inman, 34 R. I. 391, it was not questioned that the judgment by default was entered in circumstances of accident and unforeseen cause. It also appeared that the defendant wished to file a plea and go to the jury upon a claim which if established would be a perfect defence to the action: nor could it be said conclusively that in making this (4) claim the defendant was not acting honestly. The error that we found in the action of the justice of the Superior Court who presided in that cause was that he heard the evidence for the purpose of passing upon its sufficiency to support the defendant's claim, and denied the application for relief solely because he reached the conclusion that in his opinion the defence should not prevail. This was a matter that could only properly be passed upon by the tribunal charged with the trial of the case. The plain distinction which this court drew in its opinion, a distinction universally recognized in the authorities, was that it was the duty of the Superior Court to determine whether or not the defence urged was frivolous or was one that amounted to a defence in law, and whether or not it was being urged in good It was error for the court to base its action upon a finding that the defence claimed should not prevail on a trial. In the present case the defendant failed to show to the Superior Court that the default was entered in circumstances that entitled it to relief or that it has a meritorious defence to the action.

The defendant's exception is overruled. The cause is remitted to the Superior Court for further proceedings following the judgment.

Alfred S. & Arthur P. Johnson, for plaintiff. `Philip C. Joslin, Ira Marcus, for defendant.

JULIAN H. DURFEE vs. DISTRICT COURT, FIRST JUDICIAL DISTRICT.

JULIAN H. DURFEE vs. SUPERIOR COURT.

JULIAN H. DURFEE vs. DISTRICT COURT, FIRST JUDICIAL DISTRICT.

DECEMBER 12, 1922.

PRESENT: Sweetland, C. J., Vincent, Stearns, and Sweeney, JJ.

- (1) Mandamus. Jurisdiction. Trespass and Ejectment.
- Upon entering a writ of trespass and ejectment in a district court plaintiff filed a claim for jury trial. Defendant during the session of the court answered the case and filed a special appearance "for the purpose of demurring to said declaration." One week after the entry day, the cause was certified to the superior court which remanded it to the district court for want of jurisdiction:—
- Held, that under Gen. Laws, cap. 286, §§ 7 and 8 in connection with § 5, providing that in such an action either party may claim a jury trial on entry day and if the case be answered during the session of the court it shall at once be certified to the superior court, the provision for certification is mandatory, and a district court is not justified in retaining such case for any purpose.
- Held, further, that the case should have been certified on entry day, and when it was certified on the following week such certification should have been considered as of the entry day, and the superior court should have retained jurisdiction.
- (2) District Courts. Certification of Cause. Jurisdiction.
- The failure of a clerk of a district court to certify a case upon a claim for jury trial at the time required by statute, does not affect the jurisdiction of the superior court, and if the case is later certified whether voluntarily or by mandamus proceedings, it should be treated as far as circumstances will permit as though duly certified in accordance with the statute.
- (3) Trespass and Ejectment. Jurisdiction. Certification.
- Upon entering a writ of trespass and ejectment in a district court plaintiff filed a claim for jury trial. Defendant during the session of the court answered the case which was continued one week "for hearing on demurrer."
- Held, that while the positive requirement of the statute for certification admitted of no exception, such certification was in effect a transfer of the entire case to the superior court, where it should be tried on all issues of law or of fact which may arise between the parties.
- (4) Pleading. Trespass and Ejectment. Further Pleas in Superior Court.
- Although the language of Gen. Laws, cap. 287, § 3, as amended by Pub. Laws, cap. 2184, giving to parties in any case certified to the superior court from a

district court on claim of jury trial, the right to file further pleas within 10 days from certification, is general, it is so inconsistent with the procedure in trespass and ejectment prescribed by cap. 286, § 8, that neither § 3 of cap. 287 nor the decision in *Bates* v. *Colvin*, 21 R. I. 57, construing said section is applicable, to such cases.

Mandamus. Heard upon petitions for writs and granted.

SWEETLAND, C. J. Each of the above entitled causes is a petition for a writ of mandamus to be directed against the respondent court requiring it to take certain action. The questions involved are related and the petitions were heard together.

It appears by the papers that on November 17, 1922, the petitioner entered in the District Court of the First Judicial District his writ in an action of trespass and ejectment against the Standish-Barnes Company, a corporation, and Julia A. P. Sullivan to recover possession of a tenement in the city of Newport claimed to be let or held at will or by sufferance; that said November 17 was the entry day of said writ; that with his writ the petitioner filed in said district court his claim for jury trial in writing; that during the session of the court upon said entry day the defendant answered the case and filed the following: "The defendants hereby appear specially for the purpose of demurring to said declaration Robert M. Franklin, Defts. Atty.; "that on November 24, 1922, the cause commenced by said writ was certified to the Superior Court; that on December 4, 1922, the case was before the Superior Court upon the plaintiff's motion to assign; that on December 6, 1922, the Superior Court denied the motion on the ground that the case was not properly before it and that the Superior Court was without jurisdiction in said case. The case and the papers were then remanded to said district court and the papers are now in the possession of said district court. These are the essential facts as far as they relate to the first two of the above entitled causes and on these facts the petitioner asks that said district court be ordered to return the papers in said case to the Superior Court, and that the Superior Court be ordered "to entertain jurisdiction of said cause, to assign said case for trial, to place said case at the head of the docket immediately and to proceed with the trial of said cause."

As to the third of the above entitled causes it appears that on December 5, 1922, the petitioner entered in the District Court of the First Judicial District his writ in an action of trespass and ejectment against the Newport Poster Advertising Company, a corporation, and Julia A. P. Sullivan for the possession of a tenement in Newport claimed to be let or held at will or by sufferance; that said December 5, 1922 was the entry day of said writ; that with the writ the petitioner filed in said district court his claim for jury trial in writing; that during the session of that court upon said entry day said case was answered by the defendants and the case was continued by said district court "to December 12, 1922, for hearing on demurrer." Upon these facts the petitioner asks that said district court be ordered to certify said case forthwith to the Superior Court.

By statute each district court is given exclusive original jurisdiction "over all actions properly brought within its district for the possession of tenements or estates let or held at will or by sufferance." Section 28, Chapter 280, General Laws, 1909. All the provisions with reference to practice in said actions, in the district courts or in the upper courts upon appellate proceedings, indicate the legislative intent to place them in a distinct class and to prevent delay in bringing them to trial and in their disposition. Many of the provisions relating to procedure in the district court, and in the superior court upon a claim for jury trial from the district court, which are pertinent to suits upon other causes of action are without application to actions of this kind; and the same can be said of the decisions of this court construing statutory provisions which have a general application to other causes arising in district courts. class of cases shall proceed expeditiously to their conclusion, we should not assume that it is the intent of the statute

that the defendant is to be deprived of full opportunity to present any proper defence of law or of fact that he may desire to interpose, with the proviso, that it is the duty of the court firmly to insist that in the presentation of such defences there shall be no unnecessary delay.

From these general considerations we will pass to the specific questions before us. Sections 7 and 8, Chapter 286, General Laws, 1909, in connection with Section 5 of said chapter, provide that in a case for the possession of a tene-(1) ment let or held at will or by sufferance a plaintiff, as well as a defendant, may claim a jury trial on the entry day of the writ in the district court, and if the case be answered during the session of the court on that day it shall at once be certified to the superior court for the county wherein the district court is established. This provision for certification is mandatory upon the clerk and we knew of no circumstances which would justify him in failing to make certification as thus directed; neither would a district court be justified in retaining such case for any purpose. Mathewson v. Lewis, 33 R. I. 398, we held that in a case for the recovery of tenements let or held at will or by sufferance, unanswered during the session of the court upon its entry day, although jury trial had been claimed on that day by the plaintiff, such case should not be certified but should be defaulted in accordance with the provisions of Section 5 of said Chapter 286, as in such circumstances the provision for default contained in Section 5 controls that for certification contained in Section 8.

On November 17, 1922, the case of Durfee v. Standish-Barnes Co. et al. should have been certified and transmitted to the Superior Court. When on November 24, 1922, the case was certified, such certification should be considered as of the entry day, November 17, 1922, as far as the rights of the parties are concerned. It is our opinion that the Superior Court should not have refused to take jurisdiction of the case and should not have ordered it remanded to the 2) district court. The failure of the clerk of a district court to certify a case upon a claim for jury trial at the time

required by statute does not affect the jurisdiction of the Superior Court. If the case is later certified, either voluntarily or when the clerk is directed to do so by mandamus the case should be treated in the Superior Court, as far as circumstances will permit, as though duly certified in accordance with the statutory requirement. Wilbur v. Best, 22 R. I. 550.

In reference to Durfee v. Newport Poster Advertising Co., et al., the defendants urge that the case should be retained

in the district court until there can be a decision upon their demurrer, as the demurrer presents no issues for the determination of a jury. While this contention is entitled to weight, the positive requirement for certification, at once. on entry day, does not admit of this exception. For the expedition of his cause, the statute grants to a plaintiff, in an (3) action of this nature, who claims a jury trial on the entry day, immediate certification to the Superior Court, where such jury trial can be speedily afforded him; but we can not hold that in granting this to the plaintiff the general assembly intended to deprive a defendant of an opportunity to interpose a matter of law against the declaration. In view of the positive requirement for immediate certification, and also the rights which must remain in a defendant, we are of the opinion that, although the case is certified upon a claim of jury trial filed by the plaintiff, such certification is in effect a transfer of the entire case from the District Court to the Superior Court, where it is to be tried on all the issues of law or of fact which may arise between the parties. Reference has been made at the hearing to the provision contained in Section 3, Chapter 287, General Laws, 1909, amended by Chapter 2184 Public Laws, 1922, giving to the parties in any case certified to the Superior Court from a district court on claim of jury trial the right to file further (4) pleas within ten days from certification; reference has also been made to the comments of this court upon that provision in Bates v. Colvin, 21 R. I. 57, in which case it was

held that this provision was not broad enough to include a demurrer. Although the language of that section is general

it is so inconsistent with the procedure in trespass and ejectment cases of this kind in the Superior Court which is prescribed in Section 8 of Chapter 286, that in our opinion neither said Section 3 of Chapter 287 nor the decision in Bates v. Colvin, supra, is applicable to such cases. As we have said above, the certification of a duly answered case for the possession of tenements let or held at will or by sufferance on the plaintiff's claim for jury trial on entry day amounts to a transfer of the case to the Superior Court; and the case is there to be expeditiously assigned and tried without unnecessary delay upon all the issues between the parties. In the absence of explicit statutory regulation the Superior Court has authority to so regulate the travel of the cause in that court that there may be a speedy determination of the case and that all the rights of the defendant may be protected.

Upon the first of the above entitled causes a writ of mandamus will issue directing the District Court of the First Judicial District to transmit at once the papers in *Durfee* v. *Standish-Barnes Co. et al.*, to the Superior Court in the county of Newport.

Upon the second of the above entitled causes a writ of mandamus will issue to the Superior Court in the county of Newport directing it to entertain jurisdiction of the cause of *Durfee* v. Standish-Barnes Co. et al. We will not, however, by said writ direct said Superior Court as to the manner in which it shall exercise its jurisdiction in said cause.

Upon the third of the above entitled causes, a writ of mandamus will issue to the District Court of the First Judicial District directing it forthwith to certify and transmit to the Superior Court in the county of Newport the case of *Durfee* v. Newport Poster Advertising Co. et al., said certification to be as of the date of the entry day in said case.

Waterman & Greenlaw, Lewis A. Waterman, Alfred H. Lake, for petitioner.

Sheffield & Harvey, for respondents.

Robert M. Franklin, for certain respondent in case against Superior Court.

John F. Bannon et al., appellants, vs. Annie M. B. Bannon, appellee.

DECEMBER 15, 1922.

PRESENT: Sweetland, C. J., Vincent, Stearns, Rathbun, and Sweeney, JJ.

- (1) Bills of Exception. Statement of Exception.
- A bill of exceptions should contain only an enumeration of the rulings and the exceptions thereto actually taken, in the form in which they were taken each stated separately and clearly; and should not contain averments of error in the decision of the superior court.
- (2) Bills of Exception. Filing Transcript. Question of Law.
- Where an objection to a decision of the lower court is one of law, which has no relation to any of the facts in the case not contained in the papers, and which solely concerns the construction of a statutory provision, no transscript need be filed, as it would be unnecessary for the determination of the exception before the court.

APPEAL FROM DECREE OF PROBATE COURT. Heard on motion to dismiss bill of exceptions and denied.

SWEETLAND, C. J. The above entitled cause is an appeal from a decree of the Probate Court of Central Falls setting off to the appellee, in addition to her dower, certain real estate of which her husband, Peter Bannon late of Central Falls, died seized and possessed. The said Peter Bannon died testate. His will was duly probated in the Probate Court of Central Falls and the appellant, John F. Bannon, was appointed and has qualified as executor thereof.

The appeal was heard before a justice of the Superior court sitting without a jury. No testimony was introduced but the counsel for the appellee stated to the court the needs of the widow and the amount and condition of the testator's estate. Counsel for the appellants did not question the truth of these statements and admitted that the decree of the probate court should be confirmed if an allowance to a widow whose husband died testate was warranted under the provision of Section 9, Chapter 313, General Laws, 1909. After hearing, said justice confirmed the decree of the probate court. The appellants duly excepted to this de-

cision and filed their bill of exceptions which was allowed by said justice. The cause is now before us upon the motion of the appellee that the bill of exceptions be dismissed on the ground that the appellants are without standing here because they did not file with their bill of exceptions a transcript of the evidence and have said transcript allowed. It might be urged that as no evidence was presented before the Superior Court no transcript of evidence could be obtained. If however we should treat the statement made by counsel for the appellee at the hearing in the Superior Court and assented to by counsel for the appellants as the evidential facts in the case upon which the Superior Court acted; and it should also appear that a written statement of such facts allowed by the judge could have been filed here, nevertheless the failure of these appellants to do so would not warrant us in dismissing their exception at this time.

In their bill the appellants intend the following as a statement of their exception: "Said appellants aver that the decision of said court rendered for the appellee as appears in the papers in said cause was erroneous and as grounds therefore say that the decision is contrary to law and that appellants aver that the decision of said justice was wrong and erroneous and ought to be reversed and the exception of these appellants thereto should be sustained and judgment rendered for the appellants." This is open to the criticism that it is an averment of error in the decision of the Superior Court rather than the statement of an exception thereto and in that respect does not comply with the practice in drawing bills of exceptions adopted by this court in Blake v. Atlantic National Bank, 33 R. I. 109, and in Dunn 1) Worsted Mills v. Allendale Worsted Mills, 33 R. I. 115. the latter case the court said, "The only duty of an exception to a decision is to bring upon the record the fact that the party has made his legal objection to the decision." And further in the opinion, "As to the form of a bill of exceptions: except the formal parts in which the party

clearly identifies the case and the trial and concludes with a prayer for its allowance by the justice, the bill should contain only an enumeration of the rulings and the exceptions thereto actually taken, in the form in which they were taken, each stated separately and clearly." In this case after the formal introduction a proper statement of the exception would be the following: "On the eighth day of June, 1922, said justice rendered a decision for the appellee to which decision the appellants duly excepted." Although it is not explicitly before us in this matter, we have thus considered the form of the statement of exception in the bill in an endeavor to impress upon counsel the nature of a bill of exceptions and to urge the desirability of uniformity and simplicity in the statement of exceptions in a bill. will however treat the matter contained in the bill as the statement of an exception to the decision of said justice. The bill does not in any form contain reference to any other ruling of said justice to which the appellant objects.

The purpose of the statutory requirement that with his bill of exceptions the excepting party shall also file a tran-(2) script of the evidence is that this court may have before it such of the evidence and the proceedings at the trial as relate to an alleged erroneous ruling in order that it may better understand the effect of such ruling and the nature of the exception thereto. Since the enactment of the Court and Practice Act establishing the Superior Court the provision has been the same (now contained in Section 1, Chapter 2086, Public Laws, January Session, 1921), wherein a party is required, if he wishes to bring any action of the Superior Court before us for review upon a bill of exceptions, to "file in the office of the clerk with his bill of exceptions a transcript of the evidence and the rulings thereon and of the instructions to the jury or so much thereof as may be necessary for the determination of the exception."

If in the present case at the hearing upon their exception the appellants should attempt to attack the decision as being contrary to the evidence the appellee might reasonably urge that we should refuse to hear the appellants on that claim, because without the record of the evidence the appellants' contention could not be passed upon fairly. If however, as the appellants state, their sole objection to the decision is one of law, which has no relation to any of the facts in the case not contained in the papers, and which solely concerns the construction of a statutory provision, the presence of the transcript here would furnish no assistance in the consideration of that question and would be entirely unnecessary for its determination. In our opinion this case presents a situation under the statute in which no transcript need be filed because the same is entirely unnecessary for the determination of the exception before the court.

The appellee's motion to dismiss the bill of exceptions is denied.

Nathan W. Littlefield, Charles W. Littlefield, for appellants. Cooney & Cooney, for appellee.

H. O. Huot vs. Harold C. Osler, Admr.

DECEMBER 16, 1922.

PRESENT: Sweetland, C. J., Vincent, Stearns, and Sweeney, JJ.

(1) Pleading. Action Against Administrator.

In an action against X. administrator of Y. where the declaration containing the common counts alleged that defendant was indebted to plaintiff and a promise by defendant to pay, with no allegation of any dealings either with intestate or his estate or any indebtedness of the estate, there is no basis for any judgment against the estate and the words "administrator &c" are simply descriptio persona, and can properly be treated as surplusage.

(2) Principal and Agent. Pleading.

An agent who has an interest in the proceeds of the sale is entitled to sue in his own name.

Assumpsit. Heard on exception of plaintiff and sustained.

STEARNS, J. The action is in assumpsit to recover the price of certain car loads of hay sold to the defendant and was begun by a writ of attachment of the defendant's

property. In the writ defendant is described as "Harold C. Osler, of Providence, administrator of the estate of Lemuel J. Osler, late of Providence deceased, doing business as Eastern Hay Company."

Plaintiff had been engaged in the wholesale hay and straw business since 1905 and for a number of years until February 1919, had done business with Lemuel J. Osler, who was the proprietor of a business which he carried on under the name of the Eastern Hav Company. Lemuel J. Osler died February 7, 1919, and on the 18th of February his son, the defendant Harold C. Osler, was appointed administrator of Harold C. Osler continued to conduct the his estate. business at the same location and under the same trade name; he never received any authority from the Probate Court to continue the business nor has any transfer or sale of such business ever been made to him. Plaintiff had sold several orders of hav to Harold C. Ostler after the death of defendant's father. On May 17, 1921, plaintiff's salesman sold to Harold C. Osler one car load and on May 20th three car loads of hay. These cars were shipped from Boston by the firm of Buker & Dills to the firm of Donovan & Co. in Providence, who refused to accept the same. Thereupon Buker & Dills telegraphed to plaintiff and asked him to dispose of the cars for them. A part of the hay (four car loads) was sold to defendant Osler. Attached to the bills of lading on the four cars were four drafts which plaintiff paid to the Railroad Company and thereupon secured possession of the hay and delivered it to defendant. tiff claimed that he acted as a commission merchant in the transaction and commission was charged by him to Buker & Dills for his services. The defendant testified that he continued the business after his father's death as an individual and that he was the sole proprietor and owner of the business: that he understood that plaintiff was selling the hay for Buker & Dills but that he did not consider that he owed Buker & Dills for the goods. The trial justice nonsuited the plaintiff on the ground that the suit was one not against the defendant individually, but against the estate of Lemuel J. Osler and that the preliminary steps had not been taken to authorize suit against the estate. The propriety of this action of the trial justice is the sole question now raised by the plaintiff's bill of exceptions.

The direction of the nonsuit was error. The declaration, which contains only the customary common counts, alleges that the defendant was indebted to the plaintiff for the price of the goods sold and a promise by defendant to pay plaintiff therefor. There is no allegation of any dealings either with Lemuel J. Osler or his estate or any indebtedness of the estate and consequently there is no basis for any judgment against the estate. The case in this aspect is similar to and is governed by the decision in Gilbane v. Hawkins, 29 R. I. 502. The words in the writ "administrator," etc., are simply descriptio personæ; they are unnecessary in this, an action against defendant as an individual, and can properly be treated as surplusage.

Defendant in his argument before this court seeks to uphold the granting of the nonsuit on the ground alleged, that plaintiff was a naked agent and as such was not entitled 2) to bring suit in his own name. No authority is cited to sustain this claim which is not supported by the evidence. Without attempting to define the exact relation between the plaintiff and the firm of Buker & Dills and even assuming that plaintiff was simply an ordinary agent, nevertheless he was an agent who had an interest in the proceeds of the sale and as such he was entitled to sue in his own name. (See 21 R. C. L. 903 and 31 Cyc. 1621, with cases cited therein.) In the case at bar the alleged principal has made no objection to the suit and the authorities generally support the right of the agent in such a case to sue in his own name.

The exception of plaintiff is sustained and the case is remitted to the Superior Court for further proceedings.

Archambault & Archambault, for plaintiff. Christopher J. Brennan, for defendant.

WILLIAM LOISELLE et al. vs. PAWTUCKET ICE Co.

DECEMBER 18, 1922.

PRESENT: Sweetland, C. J., Vincent, Stearns, and Sweeney, JJ.

- (1) Workmen's Compensation Act. Partition of Payment by Agreement.
- In a decree under the Workmen's Compensation Act, the Court found that the second wife of deceased was entitled to the total compensation, but by request and consent of said wife decree was entered providing that the amount should be divided in thirds between her and the two children of deceased by his first wife. The first wife appeared as the next friend of her two minor children and the decree provided that the payment for the children should be made to her to be applied to their support.
- Held, that all of the parties being before the court it was competent for the second wife to assent to the decree which thereafter would be binding upon her.
- Held, further, that as the children were parties through their next friend, the decree was binding upon them and the receipt of the next friend would be ample discharge to the respondent.

PROCEEDING under Workmen's Compensation Act. Heard on appeal of respondent and dismissed.

VINCENT, J. This case comes before us upon the appeal of the respondent from a final decree of the Superior Court entered upon a petition filed under the Workmen's Compensation Act, Chapter 831, Public Laws, 1912.

On January 18, 1922, Wilfred Loiselle, an employee of the Pawtucket Ice Company, sustained personal injuries by an accident arising out of and in the course of his employment from which injuries he later died.

Both employer and employee were subject to the provisions of the compensation act.

The deceased had been married and had two children. Subsequently his wife divorced him and he married again. The wife had also remarried and had divorced her second husband. She is not a petitioner in her own behalf but appears therein as Minnie Corbishley Sargent, the next friend of her two minor children, their custody having been awarded to her in the divorce proceedings. The second wife, Minnie Ogden Loiselle, is however a petitioner for

herself. She did not live with the deceased at the time of his death. She had instituted divorce proceedings against her husband and had obtained a decision in her favor upon her petition but, at the date of his death, the time had not arrived for the entry of the final decree.

A hearing was had in the Superior Court upon the petition, the answer of the employer, and oral testimony and findings of fact were made which, so far as they relate to the questions now presented for our consideration, are as follows:

"That the petitioner Minnie Loiselle, second wife of said deceased, was living separate and apart from said deceased at the time of his death for justifiable cause.

"That the said petitioner, Minnie Loiselle, second wife, was by conclusive presumption, wholly dependent upon said deceased for support at the time of his death.

"That the said minor petitioners, William Loiselle and Wilfred Loiselle, Jr., children of said deceased by his first wife, were at the time of the death of said deceased, in fact wholly dependent upon said deceased.

"That the said petitioner Minnie Loiselle, second wife, does not desire that the total compensation payable in respect of said death be paid to her, although she is entitled to said total compensation, but desires and consents that decision may be entered giving her one-third of said total compensation, and giving the remaining two-thirds of said total compensation, in equal shares, to said two minor petitioners, William Loiselle and Wilfred Loiselle, Jr."

Upon these facts the following decree was entered in the Superior Court. "That the said respondent shall pay, from the said 18th day of January, A. D. 1922, weekly payments of \$3.34 for the period of three hundred weeks, to said petitioner Minnie Loiselle, second wife; and shall also pay to Minnie Loiselle, first wife, for three hundred weeks from said 18th day of January, 1922, weekly payments of \$3.33 to be applied by said first wife to the support of said minor petitioner William Loiselle, and the additional weekly amount of \$3.33 for said three hundred weeks to be

applied by said first wife to the support of said minor petitioner Wilfred Loiselle, Jr."

From this decree the respondent has appealed, stating its reasons of appeal as follows:

"Said final decree is erroneous and contrary to law, in that under the facts shown the second wife of the deceased is by law conclusively presumed to be wholly dependent upon the earnings of said deceased.

"Said final decree is erroneous and contrary to law, in that the facts shown necessitate an award of the entire compensation payable, to said second wife.

"Said final decree is erroneous and contrary to law, in that although said second wife is by law conclusively presumed to be wholly dependent upon the earnings of said decreesed, said decree orders the payments of compensation to be divided between said second wife and the children of the deceased's first wife.

"Said final decree is erroneous and contrary to law, in that it subjects said respondent, outside of the provisions of the Workmen's Compensation Act, to the performance of a private agreement reached between the petitioners as to a division of the compensation payments."

The respondent does not contend that the amount of the award is unjust nor that it is unwilling to bear the burden which the decree imposes but argues that the finding that the second wife is entitled to the entire compensation is erroneous for the reason that she and the children of the first wife should stand upon an equal footing, all of them being wholly dependent upon the earnings of the deceased, and consequently that the decree should secure to them the amounts therein specified independent of any concession on the part of Minnie Odgen Loiselle, the second wife.

It does not seem to us that the determination of that question is essential to the disposition of the present case. It is quite apparent that if we adopted this view of the respondent the petitioners would receive the same amount

and in the same proportions as they would receive under the decree of the Superior Court as it now stands.

The respondent further argues that, the Superior Court having found that the second wife is entitled to the total compensation, it was error to decree that the amount should be equally divided between her and the two children of the husband by a former wife. It appears that the second wife, Minnie Ogden Loiselle, not only assented to but specifically requested that the decree be entered in its present form. Whether in so doing she was actuated by a kind impulse or influenced by some misgiving as to her legal right to the whole amount we need not discuss.

She took no appeal from the decree thus entered and, so far as she is concerned, it stands in full force and effect. All the parties in interest were before the court and we see no reason why it would not be competent for Minnie Ogden Loiselle to assent to the entry of the decree in question which thereafter would be binding upon her.

Lastly, the respondent claims that the decree is erroneous in that it subjects the respondent to the performance of a private agreement between the petitioners as to the division of the compensation payments, such agreement not being authorized by the compensation act, and therefore the respondent would not be protected in making payments to Mrs. Sargent, the mother of the children, but might be liable to pay a second time in case it were made to appear that the money had not been expended for the beneficiaries.

The children became parties to the petition through their mother as next friend and as such she had full authority to direct the management of the proceeding until its final conclusion. That being so the decree would be binding upon the children. We think that the respondent will be amply protected in paying to the mother, Mrs. Sargent, the amounts specified in the decree, being the respective shares of her minor children, William Loiselle and Wilfred Loiselle, Jr., and that her receipt for the same would be an ample release and discharge.

As the main object of the respondent's appeal is to guard against double payment, and as we think that the respondent is already secure in that respect, we see no reason for disturbing the decree appealed from.

The respondent's appeal is denied and dismissed, the decree of the Superior Court is affirmed, and the cause is remanded to said court for further proceedings.

Joseph T. Witherow, for petitioners. Ralph T. Barnefield, for respondents.

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IDA HURVITZ vs. HARRY HURVITZ.

DECEMBER 22, 1922.

PRESENT: Sweetland, C. J., Vincent, Stearns, Rathbun, and Sweeney, JJ.

(1) Divorce. Neglect to Provide. Time.

Under cap. 247, § 2, Gen. Laws, providing that a divorce shall be decreed "for neglect and refusal for the period of at least one year next before the filing of the petition, on the part of the husband to provide necessaries for the subsistence of his wife, the husband being of sufficient ability" the word "Next" was purposely used in fixing the termination of the period of time the neglect and refusal to provide must continue, and it was error to enter a decree on the ground of neglect to provide for a period of more than one year, terminating fourteen months prior to the filing of the petition.

(2) Divorce. Extreme Cruelty.

In determining what acts or conduct amount to extreme cruelty much depends upon the intention of the parties, the results which follow and the habits and customs common to husband and wife. A divorce on this ground will be granted only upon affirmative convincing evidence that the petitioner is without fault and that the respondent has been guilty of an offence in violation of the marriage covenant.

(3) Divorce. Extreme Cruelty.

Evidence considered and held insufficient to establish the allegation of extreme cruelty.

DIVORCE. Heard on exceptions of respondent and sustained.

Sweeney, J. The respondent has duly brought this cause before the court upon his exceptions to the decision of a justice of the Superior Court granting the petitioner an

absolute divorce upon the two grounds alleged in her petition, namely, (1) that the respondent has neglected and refused to provide necessaries for the petitioner for a period of at least one year before the filing of the petition and (2) that he has been guilty of extreme cruelty towards her.

The petition for divorce was filed September 28, 1921, and after a four days' trial in January, 1922, decision was rendered granting the petition.

The trial justice found that from April 9, 1919, to July 8, 1920 (15 months), the respondent neglected and refused to provide necessaries for his wife, although of sufficient ability to do so; that from July 8, 1920, to September 20, 1921,(14 months, 12 days), he was not obliged to support her because she was divorced from him during all of this time; and ruled that the uncondoned failure on the part of the respondent to provide necessaries for his wife for more than one year at some time prior to the filing of her petition was sufficient to require the court to grant the divorce. The respondent took an exception to this decision and claims that it was error of law for the trial justice to rule that the neglect to provide necessaries for more than one year ending 14 months prior to the filing of the petition for divorce was a sufficient ground therefor, inasmuch as the statute requires that such neglect must be for the period of at least one year next before the filing of the petition for divorce.

The statute provides that divorces shall be decreed on several grounds, one of which is, "for neglect and refusal, for the period of at least one year next before the filing of the petition, on the part of the husband to provide necessaries for the subsistence of his wife, the husband being of sufficient ability." Section 2, Chapter 247, General Laws, 1909. The words used in stating the length of time the neglect and refusal to provide necessaries must continue are so clear and definite that they are susceptible of but one meaning and no doubt or ambiguity can arise as to their meaning. This being so, force and effect must be given to every word used and the court cannot change the termination

of the period of time prescribed by the statute. To entitle a person to a divorce upon this ground, all of the elements stated therein must be proved, and in the case of Hammond v. Hammond, 15 R. I. 40, it was held that while the respondent's husband was imprisoned for two years in a penitentiary he did not have sufficient ability to provide necessaries for his wife and hence the statutory cause for divorce was not proved. If the court should ignore the meaning and effect of the word "next" in the clause under discussion, it could also ignore the meaning and effect of the same word in section 10 of the same chapter which requires the petitioner for an absolute divorce to have resided in this state "for the period of two years next before the preferring of such petition," and it has been decided that the acquirement of residence or domicile is jurisdictional and must precede the preferment of the petition for divorce. v. Walker, 32 R. I. 28. The court is of the opinion that the word "next" was purposely used by the legislature in fixing the termination of the period of time the neglect and refusal to provide necessaries must continue in order to render such neglect and refusal a ground for divorce. It follows that the ruling of the trial justice that the respondent's neglect and refusal to provide necessaries for his wife for a period of more than one year, terminating 14 months prior to the filing of the petition for divorce, was sufficient ground therefor is erroneous, and the exception thereto is sustained.

The respondent also took an exception to the decision finding that he had been guilty of extreme cruelty and claims that the decision is contrary to the evidence and the weight thereof. In determining what acts or conduct (2) amount to extreme cruelty, much depends upon the intention of the parties, the results which follow, and the habits and customs common to husband and wife. Grant v. Grant, 44 R. I. 169. The state will permit a divorce to be granted only upon affirmative convincing evidence that the petitioner is without fault and that the respondent has been guilty of an

offense which is in violation of the marriage covenant. McLaughlin v. McLaughlin, 44 R. I. 429, 117 Atl. Rep. 649.

The probative value of the testimony of the petitioner is greatly impaired by the finding of the trial justice that she knew where to find the respondent and how to reach him from April, 1919, to July, 1920, and that if she had wanted to get in touch with him during that time she could have done so, when the record shows that she made an affidavit in her previous petition for divorce, filed November 12, 1919, in which she stated that the respondent was out of the state; that she had no information or belief as to his residence: and that she had not been able to ascertain his address or residence after reasonable inquiry and search for six months. July 27, 1921, the respondent filed a motion to vacate the (3) final decree entered in said cause, stating as reasons therefor that the affidavit made by the petitioner was false inasmuch as she knew at all times where he could be found during the six months preceding the date of said affidavit, and September 20, 1921, a decree was entered vacating said final decree.

The testimony shows that the parties lived together as husband and wife in their own home until the death of their four-months-old child on the 17th day of March, 1919. Soon after this unhappy event they separated, she going to her mother's home and he going to Detroit early in April, 1919, where he remained until December, 1920, when he returned to Providence. She testified that he left her and that then she was obliged to return to her mother's house. He testified that they went to live at her mother's house, where he remained for a week, and that then he left because they accused him of being responsible for the death of the She admits that she accused him of killing the child but testified that the trouble did not start over its death. According to her testimony there was a few hours delay on his part in getting a doctor for the child but, as the child was sick for a long time and she was able to go out and attend to business matters for her husband, she could have called a doctor for the child whenever she had thought that it required medical attention. The doctor came in response to the husband's call and testified that he had no hope for the child's recovery from the first, and said that the child should have received medical treatment at least two or three days before he was called.

The petitioner testified that the respondent staid out late about two nights each week at a gambling place; that he drank and gambled; and that when she tried to make a better man of him he would call her vile names. The respondent denied that he drank or gambled and said that when he was out nights he was attending a meeting of men engaged in his line of business. She testified that one night she and a neighbor went to the gambling place after her husband for the purpose of taking him home; that he ran out the back door and chased her up the street but did not catch her; and that he did not return home for three days thereafter. The respondent testified that on this occasion his wife threw stones through the windows in the building and that he was obliged to pay for them.

Another claim made by her is that he attempted to strike her with a piece of iron. It appears from the testimony that she called at his place of business and had an argument with him because he had given her a check which proved to be worthless. The petitioner called as a witness a man who worked for the respondent and who was present at the time He testified that the parties were quarreling and fighting over money matters, that she was cursing him and he was cursing her, that the respondent reached for a piece of iron, and that he (the witness) then stepped between them and put them out of the shop, locked the door, and afterwards gave the key to the respondent, his employer. The petitioner also claims that the respondent swore at her and called her vile names. A letter written by her has been introduced in evidence and in it she calls the respondent one of the names she testifies he called her.

There is nothing in the testimony to show that the petitioner was afraid to go after the respondent at any time or place or that she was apprehensive that he would cause her bodily harm. Some of his misconduct of which she complains was provoked by her. It appears from the testimony that when he used coarse language to her she retorted in kind. There is no medical or other testimony to show that his conduct affected her health. The testimony relating to the charge of extreme cruelty is meagre and unsatisfactory and is clearly insufficient to support the finding of extreme cruelty, and the exception thereto is sustained.

The petitioner may appear before this court, if she shall see fit, on Friday, December 29, 1922, at ten o'clock A. M., and show cause, if any she has, why an order should not be made remitting the case to the Superior Court with direction to dismiss the petition.

Philip C. Joslin, Ira Marcus, for petitioner. Bellin & Bellin, James B. Littlefield, for respondent.

JAMES H. BROWN vs. THE SOLDIERS' BONUS BOARD.

MARCH 21, 1922.

PRESENT: Sweetland, C. J., Vincent, Stearns, Rathbun, and Sweeney, JJ.

(1) Soldiers' Bonus.

Petitioner who was a member of the National Guard of the State April 6, 1917, was mustered into the Federal service by signing a Muster Roll, and was honorably discharged May 11, 1917. As a member of the National Guard he performed military service within the limits of the State in the nature of police duty.

Held, that the Federal service performed by petitioner was not included within the provisions of the Bonus Act, Cap. 1832, Pub. Laws, 1920.

CERTIORARI. Heard and writ dismissed.

STEARNS, J. The proceeding is by writ of certiorari.

Petitioner claims that he is entitled to receive a soldier's bonus under the provisions of Pub. Laws, 1920, Chap. 1832. His claim was denied by the Soldiers' Bonus Board and

petitioner alleges that this action of the board was erroneous. The facts are not in dispute and are substantially as follows:

In February, 1917, the Governor of this State, acting on the request of the United States Government, communicated to him by the commanding general, Eastern Department, Governor's Island, N. Y., ordered protection to be furnished by the National Guard over certain railroad bridges in this State.

On April 2, 1917, the Governor (special orders No. 66) issued an order a part of which is as follows: "IV. Complying with telegraphic instructions from Headquarters, Eastern Department this date, the 2d, 5th, 12th, and 15th companies organized as a battalion, will assembly at their respective stations today for initial muster into United States service," under command of Major Johnson, R. I. Coast Artillery, N. G. to assist in guarding public utilities. In response to this order petitioner, who was a member of the National Guard, reported for duty and was stationed at the State Armory. His duty required him to visit the several detachments of the battalion which were on guard at reservoirs and certain bridges and to supply them with On the 6th of April war was declared with Germany. On that day petitioner was mustered into the Federal service by signing a Muster Roll, which was also signed by Col. Blake, a regular army officer and the National Guard instructor of this State, and also by a National Guard officer. May 11, 1917, petitioner was honorably discharged "By reason of having dependents, in accordance with Bulletin 36, 1917, Eastern Department." This discharge is made out in the usual form of the State of Rhode Island National Guard discharge, on the regular blank provided by the State for such purpose and is executed by Major Johnson, commanding Provisional Battalion R. I. Coast Artillery. Subsequently, at the request of the petitioner, this discharge paper was sent to the War Department in Washington. The Adjutant General of the U.S. Army added thereto the following statement:

"WAR DEPARTMENT,

Oct. 14, 1921.

THE ADJUTANT GENERAL'S OFFICE.

The records of this office show that James E. Brown, Sergeant, Q. M. Corps, attached to Provisional Battalion, Coast Artillery, National Guard, State of Rhode Island, enlisted June 14, 1916, reported for Federal Service April 2, 1917, under the call of the President, and was honorably discharged from the Federal Service May 11, 1917.

J. ERWIN

Adjutant General."

Petitioner has received a bonus from the Federal Government under the Federal law. (Fed. Stat. Ann. 1919, Supp. p. 368, Sec. 1406.) This fact however has no particular relation to the question before us (Bannister v. Soldiers' Bonus Board, 43 R. I. 346), which is to be decided by reference to the provisions of the State act, Chapter 1832.

Section 1, Chapter 1832, is as follows: "In recognition of the patriotic services of residents of the state who served in the army and navy of the United States during the war with Germany, provision is hereby made for the payment of a soldiers' bonus and for the creation of a board to be known as The Soldiers' Bonus Board, with full and final authority to determine what residents of the state are entitled to payments under the provisions of this act."

Section 2 provides for the payment of the bonus to each commissioned officer and enlisted man "duly recognized as such by the war or navy department, who was mustered into the federal service and reported for active duty on or after April 6, 1917, and prior to November 11, 1918,"
. . "and, provided further, that no benefits shall accrue under this act because of the service of any person appointed to or inducted into the military or naval forces who had not reported for duty on or prior to November 11, 1918, at the military cantonment or the naval station to which he was ordered."

Chapter 1832 became a law January 9, 1920, more than a year after the armistice and the cessation of hostilities. At that time the facts in regard to the various classes of military service which had been rendered to the Federal Government were well known to the legislature which was then legislating in regard to what had been done in the past. Not every person who had performed military service for the Federal Government within the prescribed period was entitled to receive a bonus. Sections 2 and 4 limit the class in certain specified respects. Although the Bonus Board does not now urge its right to determine the question with full and final authority as provided in Section 1, yet the attempt by the legislature to confer such power on the board seems fairly to indicate an intention on the part of the legislature to restrict the payment of a bonus to such persons as clearly come within the terms of the act. The bonus is a gift by the State to certain beneficiaries who are designated by the act. The scope of the act is defined and restricted by Section 1 to residents of the State who served in the army and navy of the United States during the war with Germany. What constituted that army? The Selective Service act, or as it is often called the Draft act, was approved May 18, 1917. Speaking of this act the Secretary of War in his report to the President (War Department Annual Reports 1917, p. 12) says: "The Act of May 18, entitled 'An act to authorize the President to increase temporarily the Military Establishment of the U. S.' looked to three sources for the army which it created: 1. The regular army. 2. The National Guard. 3. A national army raised by the draft, to be summoned by the President at such time as he should determine wise."

July 3, 1917, the President by proclamation called into the Federal service and drafted the National Guard of the several states. Later the national army was assembled under the Selective Service act. The army of the United States for the war with Germany was thus created and established by act of Congress to accomplish a particular

purpose, by a new organization and, as stated by the Secretary of War, the act created but one army, selected by three processes. Petitioner belonged to neither branch of this army, which had not come into existence at the time he performed his military service. Hostilities on land did not begin until many months after the time of the creation of the new army. Having dependents, in pursuance of the policy of the government with reference to the National Guard and the national army, petitioner was not called upon for service in the new army. As a member of the National Guard he performed military service within the limits of the State in the nature of police duty, first by order of the State and later by order of the President. Assuming that petitioner was in the Federal military service after April 6th. he was thus engaged as a member of the National Guard. In his discharge it is expressly stated that he is "honorably discharged from the National Guard of the United States and the State of Rhode Island." As a member of the National Guard he was subject to perform military duty for the State and also in certain emergencies for the Federal Government. The Federal service he performed was not included in the provisions of the Bonus act. We find that petitioner's claim was properly disallowed.

The writ of certiorari is dismissed.

Edward H. Ziegler and Charles A. Kelley, both of Providence, for petitioner.

Herbert A. Rice, Attorney General, for respondent.

HAROLD B. WOODWARD vs. CATHERINE E. O'DRISCOLL. DECEMBER 16, 1922.

PRESENT: Sweetland, C. J., Vincent, Stearns, Rathbun, and Sweeney, JJ.

(1) Automobiles. Negligence.

One who was backing a truck out of a shed onto the street, being unable to see the street and relying upon another employee to direct his movements and who failed to stop immediately upon receiving a signal so to do but ran the truck backward a distance of four feet, causing a collision with the car of plaintiff was guilty of negligence.

(2) Automobiles. Contributory Negligence.

Where plaintiff knew of the existence and use of an entrance to a lumber shed of defendant by trucks of defendant in moving lumber, the street wall of the shed being built close to the inner side of the sidewalk, in the exercise of due care he was under the obligation to consider the possibility of meeting some vehicle at the point of exit from the shed and regulate his conduct accordingly, but he was not bound to anticipate negligence, and where he was driving slowly and had until within approximately one hundred feet of the entrance watched that point, the temporary withdrawal of his eyes for a few seconds during which interval a truck of defendant was backed into the street cannot be held to be negligence as a matter of law.

(3) Contributory Negligence. Motion to Direct Verdict. New Trial.

Except in clear cases in which there is no room for reasonable difference of judgment, the question of contributory negligence is one of fact and as such is in the first instance properly submitted to the jury. The question of the weight and the preponderance of the evidence is not properly raised on a motion for the direction of a verdict but can be and should be considered only by the justice in later proceedings upon motion for new trial, and such question will not be considered on exceptions by the appellate court.

TRESPASS ON THE CASE. Heard on exception of defendant and overruled.

STEARNS, J. The action is trespass on the case for negligence.

The case was tried by a jury by whom a verdict was found for the plaintiff and is now in this court on defendant's bill of exceptions. The only question is, was the action of the trial justice in refusing, at defendant's request, to direct a verdict for the defendant, error?

Shortly after the noon hour, on the 12th of April, 1918, plaintiff, who lived in Barrington and was on his way to his home, drove in his Ford touring car down Wickenden street in the city of Providence and turned to the right at Gano street, which latter street runs north and south and parallel with the river. Plaintiff then proceeded to the south along Gano street intending to turn to the left on Tockwotton street, the next street intersecting Gano street, and intending to proceed to his left and to the eastward by Tockwotton street to and over the Washington Bridge. A short distance south of the corner of Wickenden and Gano streets

there is a sharp bend in the street. Plaintiff testifies that as he rounded this corner or bend he looked carefully ahead and that there was no one on the street; after he had proceeded a few feet he noticed that the traffic was congested on Tockwotton street in the vicinity of the bridge; he looked over to his left to ascertain the cause and saw that the drawbridge was open; he was driving on the right-hand side of the highway about two feet from the right-hand curb, driving slowly, between twelve and fourteen miles an hour. As he looked to the left, he saw the left-hand side of Gano street but not the right: about the time he looked to the left, or a few seconds thereafter, a large automobile truck of defendant came into collision with plaintiff's automobile and caused the damage to recover from which this suit was brought. About two hundred feet south of the curve on Gano street, in the direction of Tockwotton street and the bridge, on the west side of the street and on plaintiff's righthand side, there was a private entrance from the street across the sidewalk into a shed of defendant in which lumber was stored. The street wall of the shed is built close to the inner side of the sidewalk. The plaintiff knew that this entrance way was used by defendant's trucks in moving lumber in or out of the shed and he testified that until he was approximately one hundred feet from the shed entrance he was looking along the road and sidewalk and toward the shed door; at that time there was no one on the sidewalk and the truck was not visible; he then turned his eyes to the left and within a few seconds the truck was backed out of the shed and struck the right front of plaintiff's car.

Defendant's employee, Charles Schwab, the driver of the lumber truck, testified that as he started to back his automobile truck out of the shed, one John Collins, another of defendant's employees, went onto the street in order to direct him out in safety; the driver could not see in either direction on the street; he started to back his car out and was moving slowly, perhaps a mile an hour, when Collins signalled him to stop; he could have stopped his car imme-

diately but allowed the car to run some four feet farther out and into the street; he then stopped the car and almost immediately the truck was struck, as he claims, by the plaintiff's car. At the time of the collision the rear wheels of the truck were in the gutter and the rear end of the truck body was about four feet from the line of the curb in the street. The driver of the truck gave no signal before going out of the shed nor did he see plaintiff's car until after the collision. Collins did not see the plaintiff's car until after the collision. Collins was looking to the south as he was directing the movements of the truck driver and his signal for him to stop was given not because of the approach of plaintiff but because Collins saw a car approaching from the direction of the bridge. It thus appears that no one saw the collision.

Defendant's servant was guilty of negligence; he neither gave a signal nor looked out onto the highway before enter(1) ing thereon. As he relied on Collins to discharge the duty of looking before entry was made on the highway, his failure to stop immediately when he received the signal to do so from Collins in the circumstances was negligence. Instead of stopping at once as he could have done and thus have remained in a place of safety he continued to run his car backward a distance of four feet which placed the rear end of the truck on the street and apparently made the collision inevitable.

We come now to a consideration of the plaintiff's conduct. This is to be tested by the established standard of ordinary care. To conform to this standard, the extent and nature of the precautions required in any given case vary. The standard of care is fixed but the measure of precaution necessary to meet this standard varies in different circumstances. The great increase in the number of motor vehicles on the highways has greatly increased the danger in the use of highways; consequently, much more care in the use of the highway is now required both of pedestrians and the drivers of vehicles than in the days when vehicles were

drawn by horses. The plaintiff had knowledge of the existence and the use of the entrance to the lumber shed. (2) Although he was not required to use the same amount of care in approaching this entrance that he should use in approaching an intersecting street, or even a public way opening into the street on which he was travelling, nevertheless in the exercise of proper and due care plaintiff was under the obligation to consider the possibility of meeting some vehicle at the point of exit from the shed, and to regulate his conduct accordingly. But the plaintiff was not bound to anticipate negligence. He could properly base his conduct on the assumption that anyone driving out of the lumber shed would exercise due care. Plaintiff was driving slowly and until within approximately one hundred feet of the entrance, he continued to watch the whole street including the sidewalk and entrance. His attention at this time was then directed more to the left and away from the entrance, but during this period of a few seconds—four or five perhaps—he still kept his eyes on the left-hand side of the highway. This was the direction from which danger from vehicles approaching from the south was to be apprehended. It might fairly be argued that plaintiff having looked to the left toward the bridge and having ascertained the cause of the traffic congestion on the bridge, should then at once have changed his field of observation so as to include not only the left-hand side of the highway but also the right-hand side and the entrance way. But his failure so to act can not be held to be negligence as a matter of law. We can not say that the temporary withdrawal of his eyes from one part of the highway in the circumstances as a matter of law constituted negligence. Except in clear cases in which there is no room for reasonable difference of judg-3) ment the question of contributory negligence is one of fact and as such is in the first instance properly submitted to the jury for its decision. The question of the weight and preponderance of the evidence is not properly raised on the motion to the trial justice for the direction of a verdict but

can be and should be considered only by the trial justice in later proceedings upon motion for a new trial. That question is not now before us.

In the case at bar as there was some substantial evidence in support of plaintiff's allegations that he was using due care this question of fact was properly left to the decision of the jury and the motion to direct a verdict was properly denied.

The exception of the defendant is overruled and the case is remitted to the Superior Court with direction to enter judgment on the verdict.

Benjamin F. Lindemuth, for plaintiff. Frederick A. Jones, for defendant.

JENNIE L. WELLS VS. JULIAN A. CHASE. JULIAN A. CHASE VS. JENNIE L. WELLS.

JANUARY 5, 1923.

PRESENT: Sweetland, C. J., Vincent, Stearns, Rathbun, and Sweeney, JJ.

(1) New Trial. Approval of Verdict.

Where the trial justice has deceased so that a verdict lacks his approval, on exceptions to a pro forma denial of a motion for new trial by another justice, the evidence on the question of negligence being conflicting, and not very strongly preponderating against the verdict and the verdict being one that fair-minded men might have found, it will not be disturbed.

TRESPASS ON THE CASE for negligence. Heard on exceptions of Julian A. Chase in both cases, and overruled.

RATHBUN, J. Each of these cases is an action of trespass on the case for negligence and involves a collision at the intersection of Governor and Waterman streets in the city of Providence between an automobile owned and operated by Julian A. Chase and an automobile owned by Jennie L. Wells and operated by her chauffeur. Wells brought suit to recover for damages to her automobile and for loss of the use of the same during the time it was being repaired and Chase brought suit to recover for damages to his automobile. The two cases were tried together in the Superior Court

before Mr. Justice Doran sitting with a jury. The jury returned verdicts as follows: For Jennie L. Wells for five hundred dollars in the suit brought by her and for Jennie L. Wells in the suit in which she was defendant. Chase filed a motion for a new trial in each case. Justice Doran having deceased before hearing said motions, both motions were assigned to another justice of said court who denied each of the motions without hearing arguments of counsel. The cases are before us on the exceptions of said Chase to the denial of said motions.

The verdicts have neither the approval nor disapproval of Mr. Justice Doran who saw the witnesses and heard them testify. The verdicts lack the support which an approval by Mr. Justice Doran might have given. See Wilcox v. R. I. Co., 29 R. I. 292.

A single question is presented, whether the verdicts are justified by the evidence. In Buttera v. R. I. Co., 110 Atl. 71, it was stated that "The established law of this State is that a verdict on conflicting evidence will not be set aside, unless the evidence very strongly preponderates against it." If the question presented by conflicting evidence be one on which fair-minded men might honestly differ the verdict of the jury will not be disturbed although another jury or even the court in considering the same evidence might 1) arrive at the opposite conclusion. Hehir v. R. I. Co., 26 R. I. 30; Powell v. Gallivan, 44 R. I. 453. The evidence was conflicting upon the issues of negligence and contributory negligence of each of the parties and after a careful examination of the transcript we can not say that the evidence very strongly preponderates against the verdicts or that fair-minded men might not honestly reach the same conclusion as did the jury which rendered the verdicts.

The exception of Julian A. Chase in each case is overruled and each case is remitted to the Superior Court with direction to enter judgment on the verdict.

Walling & Walling, for Jennie L. Wells. Henry W. Hayes, for Julian A. Chase.

MARIANO TEOLIS vs. EUGENIO MOSCATELLI, et al. JANUARY 5, 1923.

PRESENT: Sweetland, C. J., Vincent, Stearns, Rathbun, and Sweeney, JJ.

- (1) Assault and Battery. Consent to Fight, as Defence.
- An agreement to engage in a fist fight, cannot be set up as a defence in a civil suit for damages for assault and battery although such consent may be shown in mitigation of damages.
- (2) Assault and Battery. Damages.

 In an action for assault and battery, damages of \$240,—

 Held, under the evidence not excessive.

TRESPASS for assault and battery. Heard on exceptions of defendant and overruled.

RATHBUN, J. This is an action of trespass for assault and battery. The trial in the Superior Court resulted in a verdict for plaintiff for \$750. The case is before this court on the defendants' exceptions, as follows: to the ruling of the trial justice refusing to direct a verdict for the defendants and to the ruling of said justice denying defendants' motion for a new trial.

The assault resulted from a dispute between the plaintiff and defendants relative to a division fence. The plaintiff accepted the challenge of defendant Moscatelli to go into the highway and fight. After proceeding to the highway plaintiff removed his coat and was immediately stabbed with a knife by defendant Moscatelli. Plaintiff testified that defendant Neri held him and told Moscatelli to "give it to him."

The defendants contend that the plaintiff having agreed to fight consented to the assault and that such consent is a bar to recovery. The plaintiff agreed to engage in a fist fight. He never consented to being assaulted with a knife or held by Neri while Moscatelli wielded the knife. The defendants' contention that an agreement to fight is a bar to recovery for injuries received in the course of combat by one of the participants and inflicted by the other is also

1) untenable. As an agreement to break the peace is void the maxim volenti non fit injuria does not apply. See authorities cited in 5 Corpus Juris, page 630, where the rule is stated as follows: "By the weight of authority consent will not avail as a defense in a case of mutual combat, as such fighting is unlawful; and hence the acceptance of a challenge to fight, and voluntarily engaging in a fight by one party with another, because of the challenge, cannot be set up as a defense in a civil suit for damages for an assault and battery, although it seems that such consent may be shown in mitigation of damages."

We can not agree with the defendants' contention that the damages awarded are excessive. The plaintiff lost \$240 in wages and his doctor's bill was \$75. The plaintiff received nine cuts. As the result of these wounds he endured pain 2) and suffering. At the time of the trial one of his thumbs had not recovered its normal flexibility and the motion of one arm was somewhat limited.

All of the defendants' exceptions are overruled and the case is remitted to the Superior Court with direction to enter judgment on the verdict.

Charles R. Easton, for plaintiff. Anthony V. Pettine, for defendant.

CYRILLE DUFFNEY vs. THOMAS H. CLARKE, Town Treas. JANUARY 24, 1923.

PRESENT: Sweetland, C. J., Vincent, Stearns, Rathbun, and Sweeney, JJ.

- (1) Municipal Corporations. Contributory Negligence. Injury on Highway.
 In an action against a town for failure to keep a public highway safe and convenient for travellers, the question of contributory negligence was properly left to the jury.
- (2) Municipal Corporations. Negligence. Proximate Cause.
- Where plaintiff was injured through coming into contact with the handle of a gasoline pump, which was placed in the sidewalk under the direction of a town official, and it appeared that the town had notice of the practice of the owner of the pump to leave the handle on the pump where it projected over the sidewalk, in an action against the town for personal injury through coming into contact with the handle after dark:—

Held, that the proximate cause was not the temporary failure of the owner to remove the handle but was that of the town after notice to take appropriate action, thereby in effect permitting a dangerous obstruction to travel to remain on the sidewalk.

(3) Municipal Corporations. State Highways. Local Highways.

By resolution of the Legislature, a local highway, between fixed boundaries was made a part of the State highway system. At two places in the town, this local highway crossed two State roads, whereby for short distances the local highway and the two State roads coincided. These two junction portions were constructed and maintained by the State.

Held, that the maintenance of such portions by the State had reference to their connection with the State highways and not to the local highway.

Held, further, that although cap. 1904, pub. laws, 1920, made an annual appropriation to be paid to towns for the maintenance of local highways which have been adopted as a part of the State highway system but not constructed, such participation by the State did not thereby make such highways State roads for the maintenance of which the State was responsible.

TRESPASS ON THE CASE against a town. Heard on exceptions of defendant and overruled.

STEARNS, J. The action, trespass on the case for negligence, is brought against the town of West Warwick for its failure to keep a certain public highway safe and convenient for travelers. After a jury trial, which resulted in a verdict for the plaintiff, the case is now in this court on defendant's bill of exceptions.

One Sternbach was given permission by the town council to place a gasoline tank and pump connected therewith, in and on the sidewalk, on Main street in the village of Phenix. The tank and pump were placed in the sidewalk under the direction of the town official in charge of the town highways. The sidewalk was six feet wide. The pump, which was eighteen inches in diameter, was placed in position twelve inches inside from the curb. The handle of the pump when attached to the pump extended eight and three-eighths inches beyond the side of the pump over the sidewalk. This handle could be detached when the pump was not in use, but the evidence is that it was the usual practice to leave the handle on the pump all of the time. The town had constructive notice of this practice and the evidence is sufficient to establish actual notice.

Plaintiff while walking on the sidewalk, in the early evening of January 17, 1921, came into collision with the projecting handle of the gasoline pump and as a result fell to the ground and suffered serious injury. It was dark at the time of the accident and this particular locality was unlighted.

At the conclusion of the testimony, defendant requested the court to direct a verdict in its favor. The principal exception now urged by defendant is to the refusal to direct a verdict as requested.

The question of contributory negligence was properly 1) submitted to the jury. Defendant claims that the town, even if guilty of negligence, is not liable; that the proximate cause of the accident was the negligence of Sternbach in leaving the handle on the pump, and seeks to support this contention on the authority of Mahogany v. Ward, 16 R. I. 479, to the effect that the negligence of a responsible agent, intervening between the defendant's negligence and the injury suffered, breaks the causal connection between the two. But this principle is not applicable to the facts of the case at bar. The negligence alleged in this case is not the temporary failure of Sternbach to remove the handle of the pump, but the gist of the action is that the town, after notice that the handle was usually left attached to the pump, by its 2) failure to take appropriate action thereby in effect permitted this dangerous obstruction to travel to remain on the sidewalk. This was negligence for which the town is responsible.

Defendant also claims that Main street in Phenix is a State highway and hence that the town is not responsible for its maintenance. At two places in West Warwick, in another part of the town, Main street crosses two highways constructed and maintained by the State. One of these State roads runs through Natick, Quidneck and Coventry to the State line; the other is a State road which runs through the village of Apponaug and Centreville and joins the other State road above-mentioned at Quidneck.

In April, 1916, the legislature passed a resolution whereby Main street from the boundary line between Coventry and West Warwick to the Coweset Road in Crompton was made a part of the State highway system. For short distances in two different places, Main street and the two State roads above referred to coincide. From the fact that these two junction portions of the highways which are parts of each of the different highways have been constructed and maintained by the State, it is claimed that the State has constructed a portion of Main street and that as a consequence the whole length of Main street is thereby made a State road. There is nothing in the statute, however, to warrant such a conclusion. Although a portion of the land on which Main street runs has been maintained by the State. it is clear that the maintenance of such portions by the State had reference to their connection with the State highways above-mentioned and not to Main street.

Our attention is also called to Chapter 1904, Public Laws, 1920, whereby provision is made for an annual appropriation by the State to be paid to the several towns for the maintenance and repair of local highways in the respective towns which have been adopted as a part of the State highway system, but not constructed by the State. The act provides that the money thus paid to the towns shall be used for the maintenance and repair of said highways under the direction of the town councils, etc. The object of the act is to assist the towns. But such participation by the State in the expense of maintaining such highways does not thereby make such highways State roads for the maintenance of which the State is responsible.

Our conclusion is that Main street is a town highway and not a State highway.

All of defendant's exceptions are overruled and the case is remitted to the Superior Court with direction to enter judgment on the verdict.

William R. Champlin, for plaintiff.

Alberic A. Archambault, for defendant.

In Re Assignment of Joseph Najarian.

Appeal of Sarkis Boyajian.

JANUARY -31, 1923.

PRESENT: Sweetland, C. J., Vincent, Stearns, Rathbun, and Sweeney, JJ.

(1) Assignments for Benefit of Creditors. Mortgages. Liens. Dissolving Liens.

Under cap. 338, Gen. Laws, 1909, as amended by Pub. Laws, cap. 456, providing that every assignment at common law shall be effectual to dissolve any attachment levy or *lien*, placed upon the property of the assignor not more than four months prior to the making of such assignment, a mortgage is not included under the term "any lien."

(2) Assignments for Benefit of Creditors. Mortgages. Liens. Insolvency Proceedings.

Where a mortgage is given within four months of an assignment at common law, if either the assignor or his creditors desire to attack its validity proceedings must be taken in insolvency under Gen. Laws, cap. 339.

Assignment at common law. Heard on appeal of assignee from decree of Superior Court. Appeal dismissed.

STEARNS, J. On August 27, 1921, Souren Najarian and Joseph Najarian, copartners gave their joint note as copartners for \$400 and as security therefor a chattel mortgage, of the stock and fixtures of their bakery shop, to one Mugurditch Khohararian for money on that date loaned by him to the firm. This mortgage was duly recorded. September 28, 1921, a common law assignment for the benefit of creditors of the firm was made to Sarkis K. Boyajian. The assignee took possession of the stock and fixtures and on the 17th of October sold them at public auction for \$118.50. Prior to the sale the mortgagee gave notice of the mortgage to the assignee and requested that the funds realized from the sale should be held by the assignee for the benefit of the mortgagee. The assignee on March 6, 1922, filed his account in the Superior Court showing the receipts of the sale to be \$118.50 and charges of the sale, including the fee of the assignee and his attorney to be \$129.21 and asked that the account be approved. mortgagee then filed a petition alleging the refusal of the assignee to turn over to said mortgagee the proceeds of the

sale and asking the court to order the assignee to make such payment. The Superior Court, after a hearing, entered a decree directing the assignee to turn over the fund to the mortgagee. The cause is now in this court on the appeal of the assignee from said decree.

The assignee claims that the mortgage was dissolved by

the assignment, under the provisons of Chapter 338, Sec-

tion 4, General Laws, as amended by Chapter 456, Public Laws, which provides that every assignment at common law shall be effectual to dissolve any attachment, levy or lien placed upon the property of the assignor not more than four months prior to the making of such assignment; but such assignment shall not dissolve or impair any common law lien or the liens of mechanics, warehousemen or liens on personal property for work and labor done thereon. claim is that a mortgage is a lien and hence is included (1) within the terms of the statute "any lien;" that as the mortgage was made within four months of the time of assignment it is invalid against the claim of the assignee. think the phrase "any lien" in the act, was intended to be used therein and in this connection in its strict legal sense rather than in the popular and more comprehensive sense and that a mortgage is not included therein. It is true that a mortgage is often properly referred to as a lien but there is a fundamental difference in the origin and some of its incidents between a mortgage and the ordinary lien. mortgage is created by the voluntary act of the parties whereas the typical lien is created and attaches to the specific property by action of law and regardless of the consent of the parties. An assignment is the voluntary and optional act of the debtor. In the absence of statutory change a common law assignee succeeds simply to the rights of his assignor. Wilson v. Esten, 14 R. I. 621; Perkins v. Hutchinson, 17 R. I. 450; James v. Mechanics' Bank, 12 R. I. 460. As stated in the James case supra, the object of the act in providing that a voluntary assignment should dissolve any attachment or levy by a creditor is to take

advantage of the displeasure a debtor naturally feels when his property is attached and to hold out an inducement to the debtor to make an assignment for the benefit of all of his creditors. The addition of the term "lien" in the present statute in nowise changes the general object or intent of this act. In Coates v. Wilson, 20 R. I. 106, it was held that a mortgage given for an existing indebtedness which gave to the creditor a preference was valid against creditors unless proceedings in insolvency were seasonably taken to avoid the security. Neither the debtor nor his common law assignee can avoid this mortgage under the provisions of Chapter 338. If the debtor or his creditors desired to attack the validity of the mortgage, proceedings should have been taken in insolvency under Chapter 339, General Laws.

The appeal of Sarkis Boyajian is dismissed; the decree of the Superior Court is affirmed, and the cause is remanded to the Superior Court for further proceedings.

Jasper Rustigian, for petitioner. George W. Burnett, Jr., for assignee.

IDA HURVITZ vs. HARRY HURVITZ.

FEBRUARY 2, 1923.

PRESENT: Sweetland, C. J., Vincent, Stearns, Rathbun, and Sweeney, JJ.

(1) Divorce. Dismissal of Petition. Allowances for Support.

After a decision in favor of a petitioner for divorce, on exceptions of respondent the Supreme Court ordered the petition dismissed. After the filing of the petition the Superior Court had made an allowance to petitioner for her support during the pendency of the case, a portion of which was in arrears at the time of the filing of the rescript of the Supreme Court.

The decree in favor of the petitioner also ordered the respondent to pay her a stated sum per week for the support of herself and child:—

Held, that while with the dismissal of the petition the interlocutory decree of the Superior Court became eliminated in its entirety, still the rights of the petitioner under the order for the allowance were not affected as to anything due her up to the date of the filing of the rescript.

(2) Divorce. Allowances for Support. Judgments.

As under Gen. Laws, cap. 247, § 14, allowances for support are "so far regarded as a judgment for debt that suits may be brought or executions may issue thereon for amounts due and unpaid," it is immaterial whether proceedings to collect the same are commenced before or after the dismissal of the petition.

DIVORCE. Heard on motion of petitioner to delay order dismissing petition and motion denied.

VINCENT, J. On September 28, 1921, the petitioner filed her petition for divorce in the Superior Court and after a hearing thereon a decision was rendered in her favor.

The respondent then brought the case to this court upon his bill of exceptions. By an opinion filed December 22, 1922, this court held that the charges in the petition had not been sustained and the petitioner was afforded an opportunity to appear and show cause, if any she had, why an order should not be made remitting the case to the Superior Court with direction to dismiss the petition. The petitioner duly appeared by counsel, was heard, and, having failed to show cause, this court by its rescript filed January 12, 1923, ordered that the case be remitted to the Superior Court with direction to dismiss the petition.

The petitioner having filed her petition for divorce also, upon the same day, filed a petition for an allowance for her support and maintenance during the pendency of the case and, after a hearing upon the same, the Superior Court on October 1, 1921, ordered the respondent to pay to the petitioner the sum of five dollars per week.

By the interlocutory decree of the Superior Court, entered January 16, 1922, it was ordered that a decision be entered for the petitioner upon her petition for divorce; that the custody of the child be awarded to her; and that the respondent pay to the petitioner the sum of ten dollars a week, beginning January 21, 1922, for their support.

Following this decree the respondent came to this court by bill of exceptions. These exceptions covered the entry of a decision for the petitioner upon the grounds of extreme cruelty and neglect to provide, the award to her of the custody of the child, and the order requiring the respondent to pay ten dollars per week for their support.

We think that with the dismissal of the petition the decree of the Superior Court of January 16, 1922, becomes eliminated in its entirety and need not be further considered. The previous order of the Superior Court of October 1, 1921, which provided for the payment of five dollars per week for the support of the petitioner during the pendency of the petition, remains in force. The respondent having failed to keep up his payments under this order, the same were collected from him, on two occasions, by means of executions issued by the Superior Court under the provisions of Chapter 247, Section 14 of the General Laws, of 1909.

The petitioner now claims that the respondent is still in arrears and that she fears the dismissal of her petition, in accordance with the direction of this court, will debar her from any further proceedings which she might institute for the purpose of collecting the balance due; and she has accordingly filed a motion asking that the direction to the Superior Court to dismiss the petition be held in abeyance until she can take such proceedings in that court as may be necessary to compel the respondent to comply with the order now in force providing for the payment of five dollars per week.

We do not think that the dismissal of the petition will in any way affect the right of the petitioner to recover whatever may be found to be due to her under the order of the Superior 1) Court entered October 1, 1921, and accruing between that date and the filing of the rescript of this court on January 12, 1923, ordering the petition dismissed.

We have fixed January 12, 1923, as terminating the responsibility of the respondent for the payment of five dollars per week for the reason that any delay in the dismissal of the petition, after that date, must be attributed to the petitioner, she having caused such further delay by her motion which is now before us.

The section of the statute above cited provides that such allowances are "so far regarded as a judgment for debt that suits may be brought or executions may issue thereon for a mounts due and unpaid." Being given the force of a judgment, it is immaterial whether proceedings to collect the same are commenced before or after the dismissal of the

petition. It seems to us that that question is fully covered in the opinion of this court in *Grattage* v. *Superior Court*, 42 R. I. 546.

At the hearing it was asserted by counsel that, in making up the amount for which execution had been issued, the weekly allowance for some portion of the time had been erroneously computed at ten dollars per week instead of five.

If that should prove to be so, the Superior Court, in ascertaining the amount now due the petitioner, should deduct thereform such sums as the respondent has paid in excess of five dollars per week.

We do not see that suspending the entry of a decree in the Superior Court dismissing the petition would be of any advantage to the petitioner and her motion is denied and dismissed.

The case is remitted to the Superior Court for the dismissal of the petition in accordance with our rescript of January 12, 1923.

Philip C. Joslin, Ira Marcus, for petitioner. Bellin & Bellin, James B. Littlefield, for respondent.

> WILLIAM F. O'NEIL vs. ARTHUR DEMERS. WILLIAM F. O'NEIL vs. AUGUST DUNN. WILLIAM F. O'NEIL vs. JOSEPH B. BLACK. WILLIAM F. O'NEIL vs. JOHN E. WARD.

NOVEMBER 6, 1922.

PRESENT: Sweetland, C. J., Vincent, Stearns, Rathbun, and Sweeney, JJ.

Pub. Laws, cap. 2231, January session, 1922, "An act to enforce the prohibition of intoxicating liquors for beverage purposes" is not obnoxious to Art. I. sec. 10, Cons. R. I., as depriving an accused of life, liberty, or property without due process of law; nor to Cons. U. S. sec. 1 of Art. XIV of amendments so far as the provisions of said chapter affect certain respondents charged in criminal complaints with a violation of said chapter.

(2) Constitutional Question. Jurisdiction.

While a case is before the court on a constitutional question certified from a district court on a criminal complaint it is not improper to entertain a



motion to dismiss the complaint on the ground that the district court lacked jurisdiction, since such question may be raised at any time before judgment in a cause.

(3) Intoxicating Liquors. Conflict of Laws. Enforcement Acts.

Pub. Laws, 1922, cap. 2231, the "Sherwood Act" is not in conflict with the Volstead Act, in that the former act prohibits the manufacture in this State of dealcoholized liquors having an alcoholic content of less than one-half of one per centum when the process of its manufacture is completed, but on the contrary there is the manifest intention on the part of the legislature to make the provisions of the State enforcement act conform to those of the Federal Act.

(4) Public Acts. Presumptions of Validity. Evidence.

In considering the validity of an enrolled act of the legislature, depending for its proper determination upon the nature of the action of the houses of the general assembly the court may receive the evidence furnished by the public records embodied in the legislative journals, and the validity of an act of the legislature will not be impeached where such journals show nothing to overcome the presumption of the validity of the act.

(5) Public Acts. Validity of Public Acts. Presumptions.

In considering the validity of an act of the legislature the court will not assume that transactions of the legislature were otherwise than the journal states nor that the members did not appreciate the nature of the action of that body.

SWEETLAND, C. J. Each of the above entitled causes is a criminal complaint preferred in the District Court of the Sixth Judicial District by the complainant as Deputy Chief of Police of the city of Providence charging the respondent with a violation of Chapter 2231, Public Laws, 1922, the same being "An act to enforce the prohibition of intoxicating liquors for beverage purposes," sometimes called the "Sherwood Act."

In said district court in each complaint the respondent by his plea in abatement brought in question upon the record the constitutionality of said Chapter 2231; and Howard B. Gorham, Esq., Associate Justice of said court, in conformity with statutory direction, has certified the constitutional questions raised to this court for its decision. The question certified is the same in each complaint and is as follows: "That Chapter 2231 of the Public Laws of the State of Rhode Island, passed at the January session of the General

Assembly, A. D. 1922, is void and unconstitutional because it is in violation of Section 10 of Article I of the Constitution of the State of Rhode Island and of Section I of Article XIV of the Amendments to the Constitution of the United States of America."

Article I, Section 10 of the Constitution of Rhode Island is as follows: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury; to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining them in his favor. to have the assistance of counsel in his defence, and shall be at liberty to speak for himself; nor shall he be deprived of life, liberty or property, unless by the judgment of his peers, or the law of the land." Section 1 of Article XIV of the Amendments to the Constitution of the United States is as follows: "All persons born or naturalized in the United States; and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

After hearing the parties and receiving their briefs and supplemental briefs, Albert A. Baker, Esq., William H. Spicer, Esq., and Walter I. Sundlun, Esq., members of the bar, stated to the court that they represented a number of respondents, in pending criminal proceedings, whose interests would be affected by our determination in the matter now under consideration, and requested permission to file a brief in support of the contention of the respondents here. Such petition was granted and they have filed a brief as amici curiae which has been considered by the court in connection with the other briefs filed.

The questions certified treat said Chapter 2231 as duly enacted by the General Assembly and approved by the governor in accordance with the formalities prescribed by law, and only bring in question the constitutionality of its provisions. The provisions of said chapter are clearly not repugnant to nor in violation of said Section 10, Article I of the Constitution of Rhode Island or Section 1, Article XIV of Amendments to the Federal Constitution, as to any matter involved in either of said complaints. No claim of that nature has been made to us by either of these respondents, nor does such repugnance or violation appear to us upon an examination and consideration of said chapter. None of its provisions, which is pertinent to this complaint, attempts to authorize an invasion of the rights secured to an accused in a criminal prosecution by the provisions of the said section of the Rhode Island constitution; nor does any of its provisions tend to abridge the privileges or immunities of citizens of the United States, deprive any 1) person of life, liberty or property without due process of law nor deny to any person within this State the equal protection of the laws contrary to the prohibition contained in said section of the United States constitution.

Our decision is that, in as far as the provisions of said Chapter 2231 affect the respondents under these complaints, such provisions are not in violation of the section of the constitution of this State nor of the section of the federal constitution relied upon in the question certified.

While said constitutional questions were pending in this court the respondent in each of said complaints moved to dismiss the complaint on the ground that said district court was without jurisdiction in the premises for the following reasons: (1) that said Chapter 2231 is in conflict with the provisions of the national prohibition act, commonly called 2) the Volstead act, and (2) that said Chapter 2231 is inoperative and void because it was not enacted by the General Assembly in accordance with the requirements of the constitution of the State. Question arises as to the propriety

of entertaining the motion to dismiss a complaint, pending in a district court, when the only matter before us connected with such complaint is a constitutional question certified. We find authority for such action however in Lace v. Smith. 34 R. I. 1. in which case a constitutional question brought on the record in a bill in equity, pending in the Superior Court, was certified to this court for determination. ing the pendency of the constitutional question here this court considered and passed upon a motion to dismiss said bill in equity in the Superior Court, which motion was based upon the ground that the Superior Court was without juris-The court based its action upon the broad ground that a question of jurisdiction may be raised at any stage of the proceedings in a cause before judgment, and said. "If the motion should be granted, the whole case including the constitutional questions raised therein, would terminate and cease to exist, therefore it becomes necessary to first inquire into the validity of the motion." We are the more inclined to be governed in this matter of procedure by the authority of Lace v. Smith because of the desirability of determining the questions involved at this time, and setting at rest the doubt that has been raised in the minds of the public as to the validity of this very important statute, for the violation of the provisions of which a large number of criminal prosecutions are now pending in the various courts In nearly if not all of which prosecutions the of the State. questions involved in this motion have been raised in one form or another.

As to the first ground of the motion to dismiss, i. e., that the provisions of Chapter 2231 of the Public Laws conflict with those of the Volstead act, it is claimed by these respondents that in some respects the State law provides for a more stringent system of prohibition than the federal statute, and in that regard conflicts with such statute. It has been held by courts before which the question has been presented that the XVIII Amendment to the federal constitution does not take away the authority of a State, in the exercise of its

police power, to absolutely prohibit the manufacture and sale of intoxicating liquors within such State; and further that in the exercise by a State of the concurrent power to enforce the amendment by appropriate legislation, given by said amendment to congress and to the several states, it is 3) not essential that the State legislation be identical with that of congress, but merely that it shall be appropriate to the purpose of enforcing the prohibition established by the article, with the proviso, that a state enforcement statute can not effectively authorize the doing of an act forbidden by the federal law. The provisions of a state statute seeking to enforce the sweeping prohibition provided for in the first section of the XVIII Amendment will not be stricken down because such provisions appear to be more drastic than those of the Volstead act. Commonwealth v. Nickerson, 236 Mass. 281; Jones v. Cutting, 130 N. E. 271; Vigliotti v. Pennsylvania, 42 Sup. Ct. Rep. 330.

It is unnecessary, however, in the matter before us to apply the principles enunciated in the cases just cited, as a comparison of the Sherwood and Volstead acts shows that, as to the matters contained in the claim of these respondents. there is no conflict between the two, either real or apparent. The respondents contend that the State act is repugnant to the provisions of Title II, Section 37 of the Volstead act. By Title II, Section 37 of that act a manufacturer may be permitted "to develop in the manufacture thereof by the usual methods of fermentation and fortification or otherwise a liquid such as beer, ale, porter or wine containing more than one-half of one per centum of alcohol by volume but before any such liquid is withdrawn from the factory or otherwise disposed of the alcoholic contents thereof shall under such rules and regulations as the commissioner may prescribe be reduced below such one-half of one per centum of alcohol." The respondents urge that the Sherwood act conflicts with the provisions of said Title II, Section 37, because under Section 3 of the Sherwood act the manufacture and sale of intoxicating liquors for beverage purposes is absolutely prohibited.

It is conceded by the parties that in manufacturing beer, ale, porter, and similar liquors which are to have an alcoholic content of less than one-half of one per centum by volume there is necessarily developed, during the process of manufacture, as a result of fermentation, an alcoholic content in excess of such one-half of one per centum by volume; and that then the excess of alcohol must be eliminated by a process of dealcoholization. This is recognized in said Section 37 of the national act; and, as therein provided, under the permit of the commissioner of internal revenue such development of alcohol and its subsequent elimination may be carried on in the manufacture of dealcoholized fermented liquors.

Notwithstanding the provision for the absolute prohibition of the manufacture of intoxicating liquors which is contained in Section 3 of the State act, Section 4 of that act recognizes the right of a person having a permit from the United States Commissioner of Internal Revenue, in conformity with the National Prohibition act, to manufacture liquor in this State. This includes the right to develop, under permit from such commissioner, as a part of the process of manufacturing fermented liquors, a content of alcohol greater than one-half of one per centum by volume, provided such alcoholic content is subsequently reduced below one-half of one per centum by dealcoholization in accordance with Section 37 of the national act. over while Section 3 of the Rhode Island act, in terms. absolutely prohibits the manufacture and sale of intoxicating liquors Section 1 of that act, in defining the meaning to be given to the phrase "intoxicating liquors." when used in the act, specifically provides that such definition shall not extend to dealcoholized beer, ale, porter or wine, nor to any beverage or liquid produced by the process by which beer, ale, porter or wine is produced, if it contains less than onehalf of one per centum of alcohol by volume.

It thus appears that the State act does not prohibit the manufacture in this State of dealcoholized fermented liquors

which have an alcoholic content of less than one-half of one per centum when the process of its manufacture is completed; that the State act recognizes the right, under permit of the commissioner of internal revenue, to produce such liquors in accordance with the provisions of said Section 37 of the national act; and that in respect to the matter which the respondents urge that is no conflict between the state and national act but there is the manifest intention on the part of the General Assembly to make the provisions of the State enforcement act conform to those of the federal act.

(4) The other ground of the respondents' motion to dismiss is that the State enforcement act never became a law because, although it was approved by the Governor, it was not passed by the General Assembly in accordance with Article IV, Section 2, of the Constitution of Rhode Island; which section provides that "The concurrence of the two houses shall be necessary to the enactment of laws."

In support of this claim the respondents state that in the senate a bill, conforming to said Chapter 2231 of the Public Laws save in some minor particulars, was reported by the committee on special legislation with recommendation of passage: that in the senate on motion of Senator Sherman an amendment was adopted adding to Section 3 a provision to the effect that the prohibition of that section did not extend to the manufacture of dealcoholized fermented liquors under a permit from the commissioner of internal revenue in accordance with Section 37 of the national prohibition act; that the Sherman amendment, so-called, was not incorporated in the body of the bill but was written upon a separate slip of paper; that when the bill was transmitted to the house of representatives the slip containing the Sherman amendment did not accompany it; that in the house of representatives the bill without the Sherman amendment was acted upon and with certain amendments upon minor matters, none of which related to the provisions contained in the Sherman amendment, was passed in concurrence; that the bill as acted upon by the house, together with the house amendments, was transmitted to the senate and there passed in concurrence with the house amendments and transmitted to the Governor. From these facts the respondents urge that the house in passing the bill did not have before it the Sherman amendment and did not concur in the senate's action; that the senate when acting in concurrence with the house so acted on the assumption that the house had concurred in the Sherman amendment and that hence there was not the concurrence of the two houses necessary to the enactment of said bill as a law.

The question arises as to whether we should consider extrinsic evidence for the purpose of impeaching the validity of an act which has been duly enrolled and promulgated as law. In the early case of State v. Septon, 3 R. I. 119, this court declared that: "It is quite sufficient to establish the existence of a public law to find it on the records of the State. If the Courts go behind that, and declare a law void because the 'General Assembly did not conform to the directions of another law in passing it, they may also be called to decide on the legality of the organization of the two Houses of Assembly, in the same incidental manner." In Field v. Clark, 143 U.S. 649, the court approved the doctrine enunciated by the Supreme Court of New Jersey in State v. Young, 29 N. J. L. 39, that, upon grounds of public policy, the copy of a bill bearing the signatures of the presiding officers of the two houses of the legislature, and the approval of the governor, and found in the custody of the secretary of state, constituted conclusive proof of its enactment and contents and could not be contradicted by the legislative journals or in any other mode. Other state courts whose opinions are entitled to great weight have held that the presumption of validity arising from the due enrollment of legislative acts should not be overthrown by the consideration of extraneous evidence tending to impeach the validity of such acts. The weight of authority in the state courts, however, is opposed to that opinion, and after full consideration we are led to depart somewhat from the

principle of State v. Septon, 3 R. I. 119. Article IV, Section 8 of the State constitution provides that each house of the general assembly shall keep a journal of its proceedings. These journals constitute public records of the matters therein contained. In our opinion when a question arises, as in this case, regarding the validity of an enrolled act and depending for its proper determination upon the nature of the action of the houses of the general assembly, we may in the consideration of that question receive the evidence furnished by the public records embodied in the legislative journals. A copy, certified by the secretary of state, of the journals of the senate and the house of representatives relating to the action of those houses upon the bill now under consideration has been filed with us, and we have examined the same. From such examination it appears that the socalled Sherman amendment did not come before the house of representatives, but that the bill was there amended in minor particulars; and, in the form in which it is now enrolled, was passed by the house of representatives and duly transmitted to the senate. In the Journal of the Senate it appears that the bill as it passed the house with the house amendments was read and there passed in concurrence, and ordered transmitted to the Governor.

Although it appears by the Journal of the Senate that the act was read before its passage in concurrence, the respondents assert that such reading was not of the body of the act but was merely a reading by title; and that the members of the senate were unaware that the so-called Sherman amendment was not a part of the bill. No warrant appears for such assertion, and we will not assume that in the senate the bill was not read as the journal states nor that the members did not appreciate the nature of the action of that body. The assumption is equally warranted that the members of the senate were aware that the Sherman amendment was no longer a part of the bill and, understanding, as we have pointed out above, that the matters included therein were embodied in the other provisions of the act and constituted

a needless addition to Section 3, no longer insisted upon said amendment. The presumption of the validity of the enrolled act is not overthrown by reference to the legislative journals. In our opinion there is no room for doubt that the act in question as it is enrolled was passed in concurrence by both houses of the general assembly.

The motion to dismiss for want of jurisdiction is denied.

The papers in each of these causes will be sent back to the District Court of the Sixth Judicial District with our decision upon the consitutional question certified thereon.

Elmer S. Chace, City Solicitor. Henry C. Cram, Sigmund W. Fischer, Jr., Assistant City Solicitors, for complainant.

Rosenfeld & Hagan, for defendants.

Baker & Spicer, Walter I. Sundlun, amici curiae.

EDWARD C. STINESS vs. DREW H. HENDERSON et al. JANUARY 17, 1923.

PRESENT: Sweetland, C. J., Vincent, Stearns, Rathbun, and Sweeney, JJ.

(1) Interpleader.

Complainant as counsel in two actions for personal injury to respondents, who at the time were husband and wife, recovered judgment in favor of the respondents. Thereafter respondents made various claims as to payment of counsel fees and expenses of suit against one another and complainant filed interpleader and a consent decree was entered permitting him to pay into court the proceeds of the two judgments after deducting his fees charged respectively against each judgment.

Decree was entered before answers were filed.

Held, that from the answers it appeared that interpleader would not lie, since the claim of one respondent was simply for breach of contract against the other, but as the decree was not appealed from and was final the parties could not be placed in statu quo by dismissing the bill, and although the case could not be disposed of as one of interpleader, the bill should be retained to make an equitable disposition of the fund.

Held, further, that the portion of the fund to which each respondent was entitled when it was paid into the court should be returned to them; the costs and expenses of complainant retained by him with consent of respondents upon filing of the bill and the fees taxed by the clerk should be

borne equally by respondents and neither should recover costs.

(2) Interpleader.

Interpleader cannot be maintained when the demand of one party is against the other personally and not upon the fund in dispute.

INTERPLEADER. Heard on appeal of one respondent and appeal sustained.

RATHBUN, J. This action was commenced by a bill of interpleader. Respondents, Eldridge E. Henderson and Drew H. Henderson, were formerly husband and wife. The complainant, a practicing attorney, was formerly counsel for the two respondents and as such counsel recovered a judgment in favor of each of the respondents in actions of trespass on the case for negligence against Estelle Dimond (see 43 R. I. 60) whose chauffeur, acting within the scope of his employment, so negligently operated an automobile as to necessitate the driving of an automobile, in which the Hendersons (then man and wife) were riding, off from the highway and against a tree thereby injuring Mrs. Henderson and damaging said automobile which was the property of her husband. All expenses (except counsel fees) necessary for the prosecution of the two said actions were paid by the The husband and wife each obtained a verdict. When the complainant as counsel collected these verdicts (Mr. and Mrs. Henderson having been in the meantime divorced) Mrs. Henderson, conceiving it to be the duty of Mr. Henderson to pay counsel for his services in her case, demanded of complainant the full amount of the judgment recovered for her. Mr. Henderson not only objected to paying counsel fees for Mrs. Henderson but suggested that he should receive out of the funds collected for Mrs. Henderson one-half of the moneys expended by him in the prosecution of the two cases. Thereupon the complainant brought this bill of interpleader.

The bill states the facts and alleges that each of the parties had made a demand upon the complainant for sums of money which, taken in the aggregate, would exceed the amount in his hands after deducting his fees, and prays that he be permitted to pay into court the proceeds of the two judgments and that respondents be required to interplead. Thereafter Mrs. Henderson abandoned her contention that

the fees of complainant as counsel in her case should be deducted from funds collected on the judgment in favor of Mr. Henderson. From the funds collected on the judgment in favor of Mrs. Henderson the complainant deducted his fees for prosecuting her case and likewise from the funds collected on the judgment in favor of Mr. Henderson deducted the fees for prosecuting his case and a consent decree was entered permitting the complainant to pay into court the proceeds of the two judgments (after deducting his fees) less the sum of \$77.80 which he was permitted to retain as costs and expenses in bringing the bill. The decree dismissed the complainant and ordered the respondents to interplead and settle the matters in controversy between themselves.

For the convenience of counsel, and at their request, a justice of the Superior Court to whom the case was assigned for hearing heard testimony before answers were filed setting out the respondents' respective claims to the fund which in accordance with the terms of said decree had been paid into the registry of the court. Afterwards Mr. Henderson filed an answer alleging that before the trial of the two cases against Estelle Dimond he and Mrs. Henderson had entered into an agreement "to share the expenses necessarily incident to said trials:" that relying upon said agreement he had incurred certain expenses (an itemized statement of which was made a part of the answer) necessary for the prosecution of their said cases. On a later date Mrs. Henderson filed an answer in which she denies making said alleged agreement and states that she "makes no claim against the complainant for any money in his hands alleged to have been recovered in a suit at law by respondent Eldridge E. Hen-. . . nor does she make any demand on said complainant other than that he pay over to her the amount due her upon a judgment obtained as set forth in said bill less his lawful fees."

The parties and said justice assumed that the issue between the respondents was whether they entered into said

alleged agreement and if they did what was the sum of the moneys expended by Mr. Henderson in accordance with the terms of the agreement. Said justice found that the respondents did agree as alleged by Mr. Henderson and that Mr. Henderson had expended in accordance with the terms of said agreement the sum of two hundred dollars and directed that one-half of said sum be deducted from the proceeds of Mrs. Henderson's judgment and paid to Mr. Henderson. A decree in accordance with the decision of said justice was entered. The case is before this court on Mrs. Henderson's appeal from said decree.

Had the answers been filed before the decree of interpleader was entered it would have been apparent that the court had no jurisdiction to decree interpleader and that the bill ought to be dismissed because it would have then appeared that Mrs. Henderson made no claim to any portion of the proceeds of Mr. Henderson's judgment and that Mr. Henderson's claim was not for any portion of the proceeds of Mrs. Henderson's judgment but a claim against Mrs. Henderson personally for breach of contract. Neither the answer of Mr. Henderson nor even the proof suggests that Mrs. Henderson assigned to him any portion of the proceeds of her judgment and the agreement relative to expenses was made long before Mrs. Henderson had any fund to assign. A bill of interpleader can not be maintained when the demand of one complainant is against the other complainant personally and not upon the fund in dispute. Boss v. Lederer, 43 R. I. at 551; 23 Cyc. 8.

The question which now arises is what disposition shall be made of the fund which the decree of interpleader permitted the complainant to pay into the registry of the court. The decree of interpleader discharged the complainant. As said decree was not appealed from and is now final, the parties can not be placed in statu quo by dismissing the bill and directing that the fund be returned to the complainant. By the strict rules of interpleader Mr. Henderson is entitled to receive no portion of the proceeds of Mrs. Henderson's

judgment and Mrs. Henderson makes no demand upon any portion of Mr. Henderson's judgment but having suggested that the court below had no jurisdiction to decree interpleader it would be illogical to dispose of the case as one of interpleader. As the money is now in the custody of the court the bill should be retained for the purpose of making an equitable disposition of the fund.

The funds being in custodia legis the portion belonging to Mrs. Henderson can not be reached by attachment in an action against her by Mr. Henderson for breach of contract and the only equitable disposition which can be made of the fund is to deliver to each of the respondents that portion of the fund to which they respectively were entitled at the time the money was paid into court. Mr. Henderson is entitled to receive the proceeds of his judgment as paid into court and Mrs. Henderson is entitled to receive the proceeds of her judgment as paid into court. The costs and expenses of the complainant, which he retained with the consent of the respondents, and the fees taxed by the clerk should be borne equally by the respondents and neither respondent should recover costs.

The appeal is sustained and the decree appealed from is reversed but without prejudice to any rights of Mr. Henderson to commence proceedings against Mrs. Henderson for breach of contract.

The parties may present to this court a form of decree in accordance with this opinion on January 26, 1923, at 10 o'clock a. m.

Daniel H. Morrissey, for complainant.

James J. McCabe, Edgar L. Burchell, for respondent, Drew H. Henderson.

Waterman & Greenlaw, for respondent Eldridge Henderson. Charles E. Tilley, of counsel.

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ACTIONS.

- The mere fact that the State may have possession of property does not in itself determine the question whether the State is the real defendant in an action nor does it preclude inquiry by the court into the lawfulness of that possession or the right of the State to retain it. Gladding v. Atchison, 69.
- 2. Where the plaintiff as lessor of a chattel might properly maintain an action for its conversion, charge that the lessee could also maintain the action was not prejudicial to the defendant. Semonian v. Panoras, 165.
- 3. A seal is required to constitute an instrument a bond, and where an action of debt on bond was brought on an instrument having all the formal requisites of a bond except that a seal was not attached, a motion to direct a verdict for defendant should have been granted. City of Providence v. Goldenberg, 327.

OF COVENANT. See PLEADING AND PRACTICE, 8.
OF TROVER. See DAMAGES, 1.

OF WIFE AGAINST HUSBAND. See HUSBAND AND WIFE, 1.
AGAINST INSURANCE COMPANY. See CONSTITUTIONAL LAW, 1.
See also, JITNEY BONDS, 1; STATE ACTION AGAINST, 1.

ADVERSE POSSESSION.

- Where the period required by the statute in order to obtain title by adverse
 possession had expired prior to the service of the statutory notice under
 Gen. Laws, 1909, cap. 256, § 6, such notice is of no importance in determining the question of adverse possession.
- Where the matter of public user was not raised by the pleadings, in a bill in
 equity, the respondent resting solely upon his claim of a right of way,
 evidence to show a dedication to and acceptance by the public was inadmissible. Loutit v. Alexander, 257.

AMENDMENT.

See Pleading and Practice, 1.

ANTICIPATORY BREACH. See DAMAGES, 3.

APPEAL AND ERROR.

 In reviewing the decision of the trial court on a petition for divorce, the appellate court will not act unless the decision was clearly erroneous. Grant v. Grant, 169.

- 2. An appeal from a decree of the superior court denying a motion to vacate a final decree and for leave to file an amended or supplemental bill in the cause, brings before the court for review only such matters as are involved in the decree appealed from, and cannot bring up any alleged error contained in the final decree itself or any matters arising in the cause previous to the entry of the final decree.
- 3. Where a bill of complaint was brought to set aside the substitution of a new policy for the original one, on the ground that the substitution had been procured by the fraud of respondent's agents and the court found against the complainant and dismissed the bill, and on motion to vacate the final decree no facts were stated warranting the court in setting aside the decree, the motion was properly denied. Kimball v. Mass. Accident Co., 271.
- 4. The exclusion of a proper hypothetical question does not constitute reversible error, when the purpose of the question was to show the negligence of a party and the jury found him to have been negligent. Lucey v. Allen, 379.
- 5. Where a justice sitting without a jury found that a gift causa mortis was made to complainant of certain bank books and his findings were warranted by the evidence, such finding of facts will not be set aside under the well settled rule that a decision upon facts by a justice sitting without a jury will not be disturbed unless clearly wrong. Lowe v. Angell, 383.

See Divorce, 2, 11-12.
Workmen's Compensation Act, 2.
See also title New Trial.

ASSAULT AND BATTERY.

 An agreement to engage in a fist fight, cannot be set up as a defence in a civil suit for damages for assault and battery although such consent may be shown in mitigation of damages. Teolis v. Moscatelli, 494.

See Damages, 11.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

- 1. Under cap. 338, Gen. Laws, 1909, as amended by Pub. Laws, cap. 456, providing that every assignment at common law shall be effectual to dissolve any attachment levy or lien, placed upon the property of the assignor not more than four months prior to the making of such assignment, a mortgage is not included under the term "any lien."
- Where a mortgage is given within four months of an assignment at common law, if either the assignor or his creditors desire to attack its validity proceedings must be taken in insolvency under Gen. Laws, cap. 339. In re assignment of Najarian, 499.

ATTORNEYS-AT-LAW. See Trial, 8-9.

ATTORNMENT.
See Landlord and Tenant, 8.

AUCTIONEERS.

- An auctioneer appointed by a town council under Gen. Laws, 1909, cap. 188,
 1, must be regarded as having the same status as one elected in town meeting under cap. 49. Sec. 1.
- 2. In this State an auctioneer is by legislative intention the holder of a civil office within the meaning of that term as used in Sec. 1, Art. IX of the constitution.
- A town council cannot appoint as an auctioneer under Gen. Laws, 1909, cap.
 188, § 1, a person who is residing in and claims a residence in the town but who is not a qualified elector for said office. Harrington, for Opinion, 288.

AUTOMOBILES.

- 1. One keeping automobiles for public hire, who lets an automobile to a person to run, which he knew or by the exercise of reasonable care should have known was in an unsafe condition on account of loose bolts, thereby rendering the automobile ungovernable while being driven on the highway is responsible for damage caused to a third person on the highway by the automobile, subject to the rules relating to proximate cause and contributory negligence. Collette v. Page, 26.
- As the hearing before the State Board of Public Roads on the revocation of an automobile license, is a judicial hearing, the decision of the Board must be based upon legal evidence of sufficient weight to support the specific charges made.
- 3. Under the provisions of The Motor Vehicle Act (cap. 1354, Pub. Laws) authorizing the State Board of Public Roads to revoke an automobile license "for any cause it may deem sufficient," the Board has power to act only on the charges made.
- 4. Action of the State Board of Public Roads in revoking license on the ground that licensee was an unfit and improper person to be licensed, having after hearing found him guilty of a single offence of receiving stolen goods, reviewed and held that the evidence was not sufficient to support the finding.
- 5. The hearing by the State Board of Public Roads on the revocation of an automobile license, is civil in its nature even though the charge against licensee is the commission of a crime, and the offence may be established by the preponderance of the evidence.
- 6. On an appeal from action of State Board of Public Roads in revoking an automobile license, where the record shows improper and prejudicial testimony, it must clearly appear that after excluding such testimony there was sufficient legal testimony to satisfy the requirement of proof by a fair preponderance of testimony.
- 7. The power of the State Board of Public Roads to revoke a license is not restricted to cases where the right of the public to use the highway in safety is involved, but where the holder of a license is charged with an offence of such a nature or committed in such a manner as to show deliberate disregard of the criminal law, although the crime is not directly connected

- with the operation of an automobile it may properly be held that the wrongdoer is not entitled to hold a license.
- 8. Semble; that the State Board of Public Roads is warranted in revoking or refusing a license whenever in good faith and in the exercise of a reasonable discretion they find that the probable use of the automobile by the licensee would be a detriment to the public safety, welfare or morals. Glass v. State Board of Public Roads, 54.
- 9. A passenger in an automobile, who was not on the lookout for trolley cars, and first saw the car which collided with the automobile, when it was about thirty-five feet away, after the automobile turned into an intersecting street, cannot be held negligent as a matter of law, where there was nothing unusual in the conditions at the junction of the streets.
- 10. Negligence on the part of the driver of an automobile is not to be imputed to a guest and generally the question of the contributory negligence of such guest is a question for the jury.
- 11. The duty of a passenger in an automobile to look is dependent on the circumstances, and in the absence of knowledge of danger, or of facts which should give him such knowledge, he may properly rely upon the driver. The passenger is not however relieved of all care but the amount of care required, varies with the circumstances.
- 12. That the rate of speed of a trolley car did not exceed that allowed by ordinance is not conclusive proof of the exercise of due care by the defendant, but is simply evidence bearing upon the question of defendant's care and is to be considered by the jury in connection with the attending circumstances in the decision of this issue. Coughlin v. R. I. Co., 64.
- 13. The fact that defendant's automobile proceeded along a one-way street in the direction prohibited by ordinance is a fact for the jury to consider in connection with all other facts bearing upon the question of defendant's negligence, and it was error to charge as a matter of law that the violation of the ordinance constituted negligence.
- 14. In a personal injury action request to charge that if plaintiff while approaching the intersection of streets where the accident occurred, was driving his machine at an unreasonable rate of speed, which speed contributed to the accident, he could not recover even though the defendant was guilty of negligence, was proper.
- 15. In a personal injury action request to charge that driving a car the wrong way on a one-way street does not make the driver liable for all accidents that may occur, was proper. Sears v. Bernardo, 106.
- 16. The driver of an automobile attempting to pass another car in front of him is bound to exercise a high degree of care and to see that the situation is such that he can safely do so. He should observe not only the space which he is intending to traverse but also the opportunities which an approaching car would have to pass him safely. If the conditions of the roadway are such as would limit the movement of the approaching car they should be observed by him, and under such conditions if he could not pass or continue on with safety it is incumbent upon him to either stop or drop back. Crystal Spring Co. v. Cornell, 114.

- 17. Where the driver of an automobile in which plaintiff was a passenger, was confronted with an emergency involving a rear end collision, and turned to the left and while proceeding diagonally across the road collided with defendant's automobile coming toward him, testimony of plaintiff's witnesses that after the driver turned to the left defendant's automobile ran several hundred feet and that four or five seconds elapsed before the collision, cannot be given weight where it appears that at the time of the collision one of the forward wheels of the car in which plaintiff was riding was about on a line with the rear wheels of the front automobile and the rear end of the car was still behind the forward automobile, for where testimony is opposed to established physical facts it must yield to such facts.
- 18. Where the speed of defendant's automobile in no wise contributed to the accident, the rate of speed is immaterial and liability of defendant cannot be predicated upon the speed of his car. Whalen v. Dunbar, 136.
- 19. While it is true that when the circumstances of the case warrant it, the question of the contributory negligence of the passenger in an automobile may be submitted to the jury under proper instructions, a request to charge in regard to the liability of the passenger which carries the implication that the passenger must exercise some care or make some protest against the action of the driver, if he would escape the charge of contributory negligence is too broad for the question for the jury is, whether under the particular circumstances of the case, the passenger was negligent in failing to apprise the driver of the danger. Barrett v. R. I. Co., 147.
- 20. In an action for personal injury by plaintiff being struck by a roll of paper which fell off a truck, which was being driven by defendant's servant, assuming that there might have been a lack of care in loading the truck, the proximate cause of the injury was in carrying the roll along the streets so insecurely placed upon the truck that it was likely at any time to fall therefrom, and evidence of negligence in this regard, would support the allegation in the declaration that defendant "so carelessly and negligently transported said merchandise that a roll of paper fell off said truck and struck said plaintiff." Golden v. Greene Co., 226.
- 21. One who drives his automobile upon a trolley track at a time when he knew or ought to have known that a trolley car was rapidly approaching and that if any mischance, such as stalling the car occurred he could not escape a collision is guilty of contributory negligence. Wilcox v. Swan, 236.
- 22. In a personal injury case, charge of the court that as defendants had admitted the automobile was theirs, if no other evidence was produced this was a prima facie case which would warrant the jury in drawing the conclusion that the person in charge of the machine was engaged in the employment of defendants, but as defendants had testified that the driver was not their servant and in their employ, this issue was to be decided upon consideration of all the testimony, was proper, as the presumption referred to by the court meant simply that plaintiffs had introduced sufficient evidence to require defendants to present their case, and this having been done the jury were to decide the issue upon all the facts in evidence. Burns v. Brightman, 316.

- 23. Where a motor vehicle has been registered under Pub. Laws, 1909, cap. 454, and a distinguishing number assigned to it, and no notice of the owner's transfer of interest has been filed with the State Board of Public Roads, in an action brought to recover damages for injuries arising out of a collision between said vehicle and a car of plaintiff, the plaintiff can rely upon the presumption that the requirements of the law have been complied with and that the defendant was the owner of the vehicle at the time of the accident.
- 24. Where a plaintiff has proved that a motor vehicle was owned by defendant at the time of an accident, it is a reasonable presumption that it was being used in defendant's business at that time. This presumption, however, is rebuttable and may be met and overcome by the evidence of defendant. Giblin v. Dudley Hardware Co., 371.
- 25. In the case of a "family automobile" the owner is chargeable with the negligence of another member of the family who is driving, if the owner is a passenger and it is being used for a purpose in the accomplishment of which the owner is interested for in such circumstances the relation of principal and agent arises between the owner and the driver.
- 26. The negligence of the driver of an automobile cannot be imputed to a guest who was a passenger in the car and who was in no way guilty of contributory negligence. Lucey v. Allen, 379.
- 27. One who was backing a truck out of a shed onto the street, being unable to see the street and relying upon another employee to direct his movements and who failed to stop immediately upon receiving a signal so to do but ran the truck backward a distance of four feet, causing a collision with the car of plaintiff was guilty of negligence. Woodward v. O'Driscoll, 487.
- 28. Where plaintiff knew of the existence and use of an entrance to a lumber shed of defendant by trucks of defendant in moving lumber, the street wall of the shed being built close to the inner side of the sidewalk, in the exercise of due care he was under the obligation to consider the possibility of meeting some vehicle at the point of exit from the shed and regulate his conduct accordingly, but he was not bound to anticipate negligence, and where he was driving slowly and had until within approximately one hundred feet of the entrance watched that point, the temporary withdrawal of his eyes for a few seconds during which interval a truck of defendant was backed into the street cannot be held to be negligence as a matter of law. Woodward v. O'Driscoll, 487.

See Carriers, 1-2. Constitutional Law, 4-9; 16-17.

BANKRUPTCY.

1. Under the provisions of the U.S. Bankruptcy Act of 1898, Section 11, a suit which is founded upon a claim from which a discharge would be a release, and which is pending against the alleged bankrupt at the time of the filing of a petition in bankruptcy against him, must be stayed until after an adjudication or a dismissal of the petition. The language of the act is peremptory, and the duty of the court to grant the stay is not affected by

the fact that the plaintiff had obtained a lien by attachment upon defendant's personal property made more than four months prior to the filing of bankruptcy proceedings.

Although a defendant receives a discharge in bankruptcy, the suit may still
proceed to a qualified or special judgment against him, to permit plaintiff
to enforce his lien or to bring suit against those secondarily liable. Star
Braiding Co. v. Stienen Dyeing Co., 8.

BANKS AND BANKING.

- Under the Federal Reserve Act power was granted to a National Bank "to act . . . as trustee, executor, administrator and registrar of stocks and bonds in so far as the exercise of such power is not in contravention of state or local law,"
- Held, that the exercise by a National Bank of the fiduciary powers enumerated in the permission of the Federal Reserve Board, was in contravention of the laws of this State.
- 2. The amendment by Congress of the Federal Reserve Act in 1918 providing that "whenever the laws of such state authorize or permit the exercise of any or all of the foregoing powers by state banks, trust companies or other corporations which compete with national banks, the granting to and the exercise of such powers by national banks shall not be deemed to be in contravention of state or local law within the meaning of that act," must be assumed as intended as the legislative construction which Congress placed upon the provisions of its own act, for the power of Congress to control a state court in the construction of the laws of its state, cannot be admitted. Aquidneck Nat'l Bank v. Jennings, 435.
- 3. Without the sanction of the general assembly, the duties of a state officer are not to be extended through the provisions of an act of congress. Aquidneck Nat'l Bank v. Jennings, 435.

BILLS OF PARTICULARS.

See EVIDENCE, 1.

BONDS.

- In an action on a bond the jury found for the plaintiff and assessed damages in the penal sum of the bond and the jury chancerized the bond in a particular amount. The court received the verdict on chancerization of the bond and directed a verdict for the penal sum.—
- Held, reversible error, for under Gen. Laws, cap. 294, §§ 3 and 4, judgment should be entered for the penal sum before the court should proceed either with or without a jury to determine for what sum execution should issue, and moreover judgment could not be entered without consent of defendant until after the expiration of seven days after rendition of the verdict for the penal sum.
- 2. It would seem that if parties to an action on a bond, desire to have the question of liability and also the question for what amount execution should be

awarded, if the jury find for the plaintiff, decided at the same time by a jury, and at the same time reserve their respective rights to attack the verdict which may be rendered on the question of liability, they are entitled to agree with the consent of the court to allow the jury which passes on the question of liability to also pass upon the question as to the amount for which an excution should issue in the event of a final judgment for the plaintiff for the penal sum of the bond. City of Providence v. Goldenberg, 327.

See Actions, 3.

See also title, JITNEY BONDS.

BREACH OF PROMISE OF MARRIAGE.

See DAMAGES, 2.

CARRIERS.

- 1. Where the evidence was conflicting on the question whether plaintiff suddenly turned his car in front of the electric car when the latter was so near that it was impossible to stop the electric car in time to avoid the accident or whether plaintiff was driving between the tracks, and vainly endeavoring to drive off the tracks when the electric car was a sufficient distance away to enable the motorman after he should have observed plaintiff's predicament to stop his car, it was a question for the jury whether the motorman had the last clear chance to avoid the accident.
- 2. Charge in a personal injury case arising out of a collision between the plaintiff's car and an electric car that even if plaintiff were negligent, "if you find that the motorman by the exercise of reasonable diligence after he observed the dangerous position (of plaintiff) could have stopped his car and avoided the collision, then you would be justified in holding the company liable" was proper, the court having previously instructed the jury that the motorman had the right to assume that if a man is running along on the track he will turn off under ordinary circumstances, and it would only be in the event that the motorman discovered that the driver had caught his wheel and was trying to get out and the motorman made that discovery in time so he could have stopped his car and avoided the accident that there would have been any duty on his part to stop his car. Cascambas v. Swan Receiver, 364.

CERTIFICATION OF CAUSE.

See Pleading and Practice, 11-14.

CHANCERIZATION OF BOND.

See Bonds, 1-2.

CONDEMNATION PROCEEDINGS.

See EVIDENCE, 2.

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CONDITIONAL SALES.

1. Where under a conditional sale lease a series of notes was given to vendor by vendee, which were not paid and vendor accepted a second series of notes in substitution for the first series, as it clearly appeared that they were taken in renewal of the first series and not as payment, it did not have the effect of passing the title to the vendee. Pugh Bros v. Marano, 1.

See DAMAGES, 1.

CONSTITUTIONAL LAW.

- 1. Pub. Laws, 1915, cap. 1268, § 9, providing that "every policy hereafter written insuring against liability for personal injuries—shall contain provisions to the effect that the insurer shall be directly liable to the injured party . . . to pay him the amount of damages for which such insured is liable. Such injured party . . . in his suit against the insured may join the insurer as a defendant, in which case judgment shall bind either or both the insured and the insurer; or said injured party after having obtained judgment against the insured alone, may proceed on said judgment in a separate action against said insurer: Provided, however, that payment in whole or in part of such liability by either the insured or the insurer shall to the extent thereof, be a bar to recovery against the other, of the amount so paid," is not obnoxious to Cons. R. I., Art. I, sec. 15. "The right of trial by jury shall remain inviolate," nor to Cons. U. S. Art. XIV of Amendments, Sec. 1, "nor shall any state deprive any person of life, liberty or property without due process of law," nor to Cons. R. I., Art. I, Sec. 10, in that its enforcement will deprive the defendant of its property otherwise than by the law of the land. Morrell v. Lalonde, 20.
- Pub. Laws, cap. 1278, "An act to furnish the City of Providence with a Supply of Pure Water," is not obnoxious to Cons. U. S. Articles V and XIV of amendments.
- 3. The first ten amendments to the federal constitution are restrictions on the powers of the federal government and not upon the powers of the State governments. Joslin Co. v. Clarke, 31.
- 4. Pub. Laws, cap. 1263, (1915) provides that any city or town council may by ordinance make such general rules and regulations governing the use and operation of motor buses in the streets and public places as it may deem necessary or desirable for the public safety, welfare and convenience and "especially to prevent congestion of traffic may itself or by such officer, board or commission as it may authorize prescribe and limit the route or routes to be traveled by such motor buses" and further any city or town council may prescribe that no motor bus shall be operated within such city or town without a special annual license therefor.
- Sec. 6 of the Motor Bus Ordinance of the City of Providence as amended by cap. 276, of the ordinances of said city approved Dec. 20, 1920, provides that "every motor bus license shall be subject to the condition that if at any time legal provision is made prescribing, limiting, altering or abolishing any route or routes to be traveled by motor buses, such license and the bus licensed shall be subject thereto and operated accordingly."



- The city council of Providence passed an ordinance prescribing that motor buses should not be operated within a specified area in the center of the retail business section of the city.
- On bill seeking to enjoin the enforcement of the provisions of the ordinance on the ground that it was a gross abuse of the regulatory power of the city council and was unreasonable, unjust and discriminatory and its provisions were unrelated to public safety or convenience, a temporary injunction was granted and on appeal of respondents.
- Held, that cap. 1263, was a delegation of police power to the city and town councils, in respect to its subject matter and while such power was expressly granted it was in general terms, the mode of its exercise being left to the discretion of the council and as to ordinances passed under such a grant of power the court will consider their reasonableness and pass directly upon their validity. Fritz v. Presbrey, 207.
- 5. All statutes are presumed to be valid and constitutional and the burden of proving the unconstitutionality of any statute is upon the party raising the question; and the proof must be beyond a reasonable doubt. Frits v. Presbrey, 207.
- 6. Before the court should act to enjoin the enforcement of the exercise of the police power to regulate traffic in the crowded streets of a city, it must appear that the ordinance was an arbitrary exercise of power or that its provisions have no reasonable relation to the promotion of the safety and convenience of the public as a whole in its use of the highways within the prescribed area, and the fact that the termini fixed by ordinance proved less convenient for some patrons of the motor buses and that the restriction of traffic resulted in pecuniary loss to certain licensees of motor buses does not render such ordinance invalid, unless it is further shown that it was adopted in arbitrary and oppressive disregard of their rights.
- 7. Where there was nothing before the court that would warrant a finding that an ordinance passed under the delegated police power of the state was invalid, it was error to stay its operation on the ground of the balance of convenience between the parties, for such principle has no application in favor of a complainant who is himself without legal right and is seeking to restrain a lawful act. Fritz v. Presbrey, 207.
- 8. In passing upon the reasonableness of an ordinance, passed under the delegated police power of the state, where the mode of the exercise of the power is left to the discretion of a municipal council, the court will apply to its provisions the tests which are applicable in determining the validity and constitutionality of a statute having a like purpose.
- 9. Courts will scrutinize legislation purporting to be enacted for the public welfare to see if the object sought calls for the exercise of the police power. If such object can fairly be said to be a regulation to promote the safety, health, morals, comfort or convenience of the community then the court will not interfere with the wide scope of legislative discretion in determining the policy to be employed in its exercise, unless it appears that the discretion has been abused and the legislative action is so clearly unreasonable and arbitrary as to be oppressive. Fritz v. Presbrey, 207.

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- 10. In proposing and approving articles of amendment to the constitution the general assembly is presumed to have had in mind certain rules of interpretation which in this State had been long established by judicial decisions when the article was proposed and submitted to the people, and the article should be construed in accordance with such rules. Opinion to the Governor, 275
- 11. In interpreting a provision of the constitution, no meaning other than the natural and ordinary meaning of the language used can be given it, unless such construction would lead to an unjust or otherwise unreasonable result manifestly not intended. Opinion to Governor, 275.
- 12. Art. XV, Amend. Const. R. I. in part provides: "If the measure shall not be returned by the governor within six days (Sundays excepted) after it shall have been presented to him, the same shall become operative unless the general assembly, by adjournment, prevents its return, in which case it shall become operative unless transmitted by the governor to the Secretary of State, with his disapproval in writing, within ten days after such adjournment."—
- Held, that in computing the period allowed the governor to return a measure with his disapproval thereof, Sundays should be included except a Sunday which happened to be the tenth day. Opinion to the Governor, 275.
- 13. If a decree of the court of another State is final and conclusive and not subject to modification or annulment by the court entering the same it is entitled under Section 1, Article IV of the constitution of the United States to full faith and credit in the courts of this State. Hewett v. Hewett, 308.
- 14. Ordinarily the law of a foreign state is a fact that must be proved by evidence, but where a provision of the federal constitution is brought in question as to the effect of a judgment of a court of another state the court will take judicial notice of the laws of such state.
- 15. Where the court taking judicial notice of the statutes and decisions of the courts of another state finds that the courts of that state are not bound to enforce the terms of a decree for alimony and that the court entering the decree may in its discretion modify or annul the same, it follows that such decree is not entitled to the protection of the full faith and credit clause of the federal constitution. Hewett v. Hewett, 308.
- 16. Cap. 93, § 4, ordinances of the city of Providence, providing that no license to operate a motor bus shall be granted to one who is not a citizen of the United States, is not in violation of the treaty between the United States and Italy, providing that the citizens of the respective countries shall enjoy the same rights and privileges as nationals, and is not unconstitutional under the equal protection provisions of the 14th amendment of the constitution of the United States.
- 17. The test of legislation denying rights to aliens is not whether there is a discrimination against aliens, but whether there is any proper basis for such discrimination. Gizzarelli v. Presbrey, 333.
- 18. Pub. Laws, cap. 2231, January session, 1922, "An act to enforce the prohibition of intoxicating liquors for beverage purposes" is not obnoxious to



- Art. I. sec. 10, Cons. R. I., as depriving an accused of life, liberty, or property without due process of law; nor to Cons. U. S. sec. 1 of Art. XIV of amendments so far as the provisions of said chapter affect certain respondents charged in criminal complaints with a violation of said chapter. O'Neil v. Demers, 504.
- 19. While a case is before the court on a constitutional question certified from a district court on a criminal complaint it is not improper to entertain a motion to dismiss the complaint on the ground that the district court lacked jurisdiction, since such question may be raised at any time before judgment in a cause.
- 20. Pub. Laws, 1922, cap. 2231, the "Sherwood Act" is not in conflict with the Volstead Act, in that the former act prohibits the manufacture in this State of dealcoholised liquors having an alcoholic content of less than one-half of one per centum when the process of its manufacture is completed, but on the contrary there is the manifest intention on the part of the legislature to make the provisions of the State enforcement act conform to those of the Federal Act. O'Neil v. Demers, 504.

CONSTRUCTION OF WILLS.

See Wills, 3.

CONTRACTS.

- Where one party to a contract waived the furnishing of guaranties of its performance by the other party, the latter cannot as a defence to an action by the former for its breach, set up such waiver by the plaintiff, where the plaintiff accepted the agreement without guaranties and acted in reliance upon the defendant's sole undertaking. McNear, Inc. v. Amer. & British Co., 190.
- 2. In an action of assumpsit to recover the price for goods sold and delivered, the burden was on defendant to establish a breach of warranty and where aside from the question as to defective goods the jury were permitted to pass on the question as to whether defendant within a reasonable time notified plaintiff of the alleged defects and there was evidence on both points in favor of plaintiff the verdict approved by the trial court will not be disturbed.
- 3. Where the contract between the manufacturer and jobber required the jobber on adjusting a claim with a customer to make a detailed record of the facts and send a copy to the home office not later than the following day and ship to the home office once in ten days the used product on hand received in making the adjustments and the jobber sent no reports and did not ship the used goods and made no claim for credits until after action brought by manufacturer his claim for credits was properly disallowed. Swinekart Tire Co. v. Broadway Tire Exchange, 253.
- 4. Where the contract between a manufacturer and jobber provided that jobber should advertise the goods and would be given a certain credit, "all such advertising to be submitted and approved by the manufacturer" and no

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advertising was submitted by jobber for approval, he was not entitled to credit for the money paid for advertising. Swinehart Tire Co. v. Broadway Tire Exchange, 253.

See Damages, 3, 10; Foreign Corporations, 1; New Trial, 2; Principal and Agent, 1-2.

See also title, SALES.

CORPORATIONS.

1. The long established rule in this state is not changed by Pub. Laws, cap. 1925, § 67, and a foreign corporation is entitled to enforce in the courts of this state a contract made by it within this state, although it had not complied with the statute by appointing a resident attorney at the time the contract was made, provided it had appointed such attorney before commencing suit. Garst v. Canfield, 220.

COUNSEL FEES.

See DIVORCE, 7-10. See GUARDIAN AND WARD, 1-3.

COUNSEL, MISCONDUCT OF.

See Exceptions, 7.

CRIMINAL LAW.

- 1. To render a finder of lost property guilty of larceny the finder must appropriate the same to his own use at the time of finding, when at that time he knows who the owner is, or has the immediate means of ascertaining that fact. If for the first time the finder learns the identity of the owner subsequent to the finding and then denies the finding, or refuses to deliver the property to the owner, such finder may be civilly liable for conversion, but is not guilty of larceny. Atkinson v. Birmingham, 123.
- 2. Request to charge that "one act of sexual intercourse was not sufficient to warrant a conviction on the charge of being a lewd, wanton and lascivious person," was properly refused where the evidence showed that defendant, a mature colored man had intercourse with a little girl under revolting conditions and was a frequenter of houses of ill fame; was guilty of vulgar statements and had lived in the same tenement with two white girls until they were sentenced to a reformatory; all the evidence warranting a finding that defendant was a lewd, wanton and lascivious person in speech and behavior, and the request taken literally amounting to a request for the direction of a verdict in defendant's favor. State v. Whitford, 376.

DAMAGES.

 Where the purchaser in a conditional sale converts the chattel the seller may recover in trover damages equal to the unpaid balance of the purchase price if the value of the chattel at the time of conversion equals or exceeds

- such balance, but if such value is less than the balance due the measure of damages is the value of the chattel, and plaintiff must show not only the balance due but also the value of the chattel at conversion in order that the jury may have sufficient data for the assessment of damages. Pugh Bros. v. Marano, 1.
- 2. In an action to recover for breach of promise of marriage while the main question is how much damage plaintiff has suffered, the amount of damage is dependent to some extent upon the amount of property defendant had, and in addition to the loss of benefits which plaintiff would have enjoyed as the wife of defendant, she is entitled to recover her financial loss and any humiliation and any impairment of health due to defendant's refusal to keep his promise to marry. Rubin v. Klemer, 4.
- 3. Plaintiff obligated himself to receive from X. and to pay him for forty flasks of quicksilver per month for six months. Plaintiff assigned the contract to defendant but there was no novation and plaintiff continued bound upon his contract. Defendant was in default and repudiated its obligation under the agreement of assignment. Held, that plaintiff was entitled to treat such renunciation as a breach of the entire agreement and to commence his action before the termination of the period within which the full deliveries were to be made.
- Held, further, that in measuring the plaintiff's damages the jury should consider not only his loss upon the amount of the quicksilver which he was obliged to receive before the defendant's breach of the contract and before the commencement of the action but also his loss in respect to the quicksilver delivered under the contract subsequent to the date of the writ.
- Held, further, that it appearing that the commodity had no value to the plaintiff for its own use and that to reduce the amount of its loss and to mitigate the damages the plaintiff had with due diligence and after proper notice sold the quicksilver from time to time at auction, evidence as to the amounts received at such sales was admissible to assist in fixing the plaintiff's damages. McNear, Inc. v. Amer. & British Co., 190.
- 4. Although an impaired condition of health may have existed to some degree before an accident, if the injury arising from the accident aggravated that condition and rendered an operation necessary, plaintiff may recover for the expense of such operation. Golden v. Greene Co., 226.
- 5. In an action by a husband to recover damages for injuries to his right of consortium in consequence of personal injuries to the wife through defendant's negligence, the loss of sexual intercourse with his wife does not constitute an element of damage, but the basis of recovery is the loss of services and is restricted to that element of the consortium together with the loss to his estate in connection with the expenses to which he has been put by reason of her disability. Golden v. Greene Co., 231.
- 6. In an action under Gen. Laws, cap. 283, § 14, to recover damages for the death of the intestate, charge that nothing could be given by way of solace for wounded feelings or for the bereavement suffered or for the pain and suffering of deceased or for the loss of the society of the wife and mother but that the measure of damages was the pecuniary loss sustained which

was the present value of the net result remaining after the personal expenses were deducted from the income or earnings of deceased and that to ascertain this it was necessary to ascertain first the gross amount of such prospective income or earnings and then to deduct therefrom what deceased would have expended as a producer to render the services or to acquire the money that she might be expected to produce, computing such expenses according to her station in life, her means and personal habits and then to reduce the net result so obtained to its present value, correctly stated the rule. Burns v. Brightman, 316.

- 7. In an action for death by wrongful act, where deceased was not engaged in an income producing occupation but devoted her time to the maintenance of her household and the care of her husband and children, and there was evidence of the value of such services as deceased performed, according to the prevailing rate of wages, but no evidence of the expense deceased would have had to incur to produce her income, there was no sufficient evidence upon which real damages could be computed.
- 8. Gen. Laws, cap. 283, § 14, of death by wrongful act covers the case of a married woman, not engaged in an income producing occupation, but whose time and energy were devoted to the maintenance of her household and the care of her husband and children, and the rule of damages is the same. Burns v. Brightman, 316.
- 9. In trover upon proof of conversion, of a chattel, if no evidence is presented as to its value at the time of conversion, the plaintiff is entitled to a verdict for nominal damages. Pugh Bros. v. Marano, 1.
- 10. Where a seller is unable to make delivery when performance is due and by mutual consent or by election of buyer to continue the contract, the time for delivery is extended, damages are to be calculated as of the time fixed by the later agreement. Screw Machine Products Co. v. Cutter & Wood Supply Co., 409.
- In an action for assault and battery, damages of \$240:—
 Held, under the evidence not excessive. Teolis v. Moscatelli, 494.

See Assault and Battery, 1. See Intoxicating Liquors, 1.

DEATH BY WRONGFUL ACT.

See Damages, 6-8.
Statutes, Construction of, 1.

DEDICATION.

1. A common law dedication does not operate as a grant but by way of estoppel in pais. The dedication is regarded not as transferring a right but as operating to preclude the owner from resuming his right of private property or any use inconsistent with the public use. By such a dedication the fee does not pass to the public but only an easement. The intention of the owner is to be ascertained from his acts and declarations, and while his

right to make a dedication subject to a condition subsequent is unquestioned, the law does not favor conditions subsequent.

2. The State was engaged in reconstructing a road as part of the state highway system. It was desirable that the highway be built through land of respondent. The town and respondent having failed to come to an agreement in regard to terms after a conference between the town committee, the agent of respondent and the engineer supervising the construction of the road for the State an agreement was entered into whereby respondent agreed to convey land to the town for the purpose of the highway and the town agreed to build certain walls and to abandon the old highway the land in which was to revert to respondent. The walls were to be built before the deed was executed. The agreement was signed by respondent, was "accepted" and signed by the committee for the town and was also signed by the engineer. The latter had no authority to bind the State. Work was begun and a highway built through respondent's land which was opened to travel but respondent claiming that the agreement had not been kept attempted to prevent travel over the road and the State secured an injunction:.

Held, that the State was no party to the agreement and whatever was to be done thereunder was to be done by the town:—

Held, further, that from the facts established by the evidence there was a valid and unconditional dedication made by respondent who intended that the public should at once acquire an easement over the new way in which respondent still retained the fee, as well as acquiring the fee in the abandoned highway. State v. Coy Co., 357.

DEEDS.

 A deed speaks for itself in all its covenants and no evidence of prior negotiations or agreements between the parties can be received for the purpose of altering or contradicting its definite covenants. Greenstein v. Rosenstein, 407.

DEFAULT, REMOVAL OF.

See JUDGMENTS, 1-4.

DEPOSITIONS.

1. Depositions may be taken in divorce cases before a standing master in chancery under Gen. Laws, cap. 292, § 40, without a special order of the court referring the matter to the master. Borda v. Borda, 337.

DISCONTINUANCE.

See Election of Remedies, 2.

DISCONTINUANCE OF CRIMINAL COMPLAINT.

See Malicious Prosecution, 12.

DIVORCE.

1. "Continued drunkenness" as a cause for divorce signifies gross and con-

- firmed habits of intoxication, and the charge is not sustained by proof of the occasional abuse of liquor by a respondent. Bevan v. Bevan, 12.
- 2. Where a respondent who had given security to the sheriff in the sum of five hundred dollars under a writ of ne exeat, was ordered in separation proceedings to pay an allowance to the petitioner and a further sum for counsel fees, and execution was issued against him and returned unsatisfied, and an order was entered directing the sheriff to pay into the registry of the court the amount of the security held by him less an allowance for his counsel fees and permitting the petitioner to withdraw the amount due her for support, etc., and the sheriff appealed;
- Held, that while it was competent for the Superior Court to order the payment of the money into its registry, an appeal was statutory and there was no provision of statute for an appeal in such a case and the appeal would be dismissed.
- Held, further, that a sheriff as an officer of the court was subject to its orders and had his remedy in a proper proceeding to test the validity of an order made upon him. Levine v. Levine, 61.
- 3. Where a respondent in a divorce petition applied for and received an allowance by order of the court, from her husband, she cannot thereafter claim in a petition brought by her, for divorce, after dismissal of the petition of the husband, that the husband neglected and refused to furnish her with necessaries during the period covered by such payments. Roy v. Roy, 160.
- 4. Similar acts or conduct in different circumstances may or may not amount to cruelty. Much depends on the intention of the parties, the results which follow, the habits and customs which are common to the husband and wife.
- 5. Where respondent's acts were designed to cause distress to his wife with the apparent expectation that he would thereby be able to coerce her and compel her to live and act in every way according to his will, thereby creating a situation where it was impossible for the wife to continue to live with him without real and serious danger to her health:—

Held, that the charge of extreme cruelty was sustained.

- 6. Where after a separation relations were resumed but respondent's conduct was unchanged, and petitioner left him, such resumption was not a condonation of respondent's offence, for such forgiveness is conditional and is forfeited by further misconduct and in cases of cruelty treatment much less cruel than would be necessary to be a good ground for divorce will suffice to avoid the defence of condonation. Grant v. Grant, 169.
- 7. The superior court is made the divorce court of the state with exclusive original jurisdiction, of the matter of allowances for counsel fees, alimony and support of children, and the supreme court acts in these matters simply as an appellate court to review alleged errors of the superior court in specific rulings and decisions.
- 8. While a petition for divorce is in the supreme court on exceptions, motion for additional counsel fees must be made in the superior court, which retains its jurisdiction and if necessary the papers can be returned temporarily to the lower court. Hurwitz v. Hurwitz, 243.



- 9. When a wife who is a respondent in a divorce proceeding files an application for an allowance to enable her to defend against the husband's petition or for her support pendente lite, the right accrues to her under the statute to have a determination upon her application and the husband will not be permitted to defeat that right by a discontinuance. If a notice of discontinuance is filed after the wife's application for an allowance has been heard and determined in her favor but before a decree has been entered the court should enter a decree as of the date of its determination for such amount as it shall deem proper in the circumstances and the petition should not be discontinued until the rights of the wife are protected.
- 10. It would seem that under the statutory provision for an allowance to the wife in the divorce proceeding to enable her to defend against a petition that counsel fees in connection with the filing and prosecution of the wife's petition for an allowance might be allowed. Stevens v. Superior Court, 282.
- 11. A petition to vacate a final decree in divorce is an independent petition and in effect is a new and original proceeding. Objection to the action of the Superior Court thereon is properly raised by a bill of exceptions.
- 12. Where a respondent has been guilty of fraud on the court and on the petitioner in having a final decree entered in divorce, and petitioner has taken prompt action to have it set aside and the rights of innocent third parties are not concerned, the right of the Superior Court to vacate the decree is clear.
- 13. The resumption of marital relations by the parties after a decision in a divorce petition and before entry of final decree, is a condonation of the offence of the husband and the court could not enter final decree thereafter even by consent of the parties. Berger v. Berger, 295.
- 14. Although there may be no evidence of physical violence, yet a course of conduct toward a petitioner for divorce, wilfully and maliciously persisted in which naturally results in causing wretchedness of mind affecting the health and rendering it impossible to longer endure conjugal relations with a respondent warrants a finding of extreme cruelty.
- 15. A finding that petitioner was guilty of gross misbehavior and wickedness repugnant to and in violation of the marriage covenant is supported by evidence that petitioner consorted with another woman, caused respondent to be recorded on the public records as the mother of the child of another woman and caused the child to be baptized as the lawful child of himself and respondent. Borda v. Borda, 337.
- 16. A petition for divorce cannot be treated as an ordinary suit for the determination of rights upon adversary claims. Throughout the travel of the cause the state desires that the marriage relation shall not be dissolved and after a showing entitling a petitioner to divorce the law will not force it upon the petitioner if he does not then desire it, nor should the court listen to the guilty spouse demanding an advantage from wrong doing.
- 17. It is error to enter a final decree for divorce against the wish of a petitioner in whose favor a decision has been given: McLaughlin v. McLaughlin, 429.

- 18. Gen. Laws, 1909, cap. 247, § 14, confers authority upon the court to regulate the custody and provide for the education, maintenance and support of children of all persons by it divorced, and the court is not limited as to time and may entertain a motion for custody and support after entry of final decree. *Enos* v. *Enos*, 450.
- 19. Under cap. 247, § 2, Gen. Laws, providing that a divorce shall be decreed "for neglect and refusal for the period of at least one year next before the filing of the petition, on the part of the husband to provide necessaries for the subsistence of his wife, the husband being of sufficient ability" the word "Next" was purposely used in fixing the termination of the period of time the neglect and refusal to provide must continue, and it was error to enter a decree on the ground of neglect to provide for a period of more than one year, terminating fourteen months prior to the filing of the petition.
- 20. In determining what acts or conduct amount to extreme cruelty much depends upon the intention of the parties, the results which follow and the habit and customs common to husband and wife. A divorce on this ground will be granted only upon affirmative convincing evidence that the petitioner is without fault and that the respondent has been guilty of an offence in violation of the marriage covenant.
- 21. Evidence considered and held insufficient to establish the allegation of extreme cruelty. Hurwitz v. Hurwitz, 478.
- 22. After a decision in favor of a petitioner for divorce, on exceptions of respondent the Supreme Court ordered the petition dismissed. After the filing of the petition the Superior Court had made an allowance to petitioner for her support during the pendency of the case, a portion of which was in arrears at the time of the filing of the rescript of the Supreme Court.
- The decree in favor of the petitioner also ordered the respondent to pay her a stated sum per week for the support of herself and child:—
- Held, that while with the dismissal of the petition the interlocutory decree of the Superior Court became eliminated in its entirety, still the rights of the petitioner under the order for the allowance were not affected as to anything due her up to the date of the filing of the rescript.
- 23. As under Gen. Laws, cap. 247, § 14, allowances for support are "so far regarded as a judgment for debt that suits may be brought or executions may issue thereon for amounts due and unpaid," it is immaterial whether proceedings to collect the same are commenced before or after the dismissal of the petition. Hurwitz v. Hurwitz, 501.

See Appeal and Error, 1; Depositions, 1; Evidence, 15-16; Prohibition, 3.

ELECTION. See Sales, 2.

ELECTION OF REMEDIES.

 Where the tort is of such a character as to afford plaintiff the right to sue in assumpsit as well as in tort, the adoption of one remedy is a conclusive bar to a resort to the other. 2. Where plaintiff has his election between co-existing remedial rights, in assumpsit and tort, which are inconsistent, and has brought action, in assumpsit, and while this action is pending brings suit in trespass, he cannot discontinue the first action and proceed with the other. Arnold Realty Co. v. Toole Co., 83.

See Landlord and Tenant, 1-2.

ELECTION, TO RENEW LEASE. See Landlord and Tenant, 6-7.

ELEVATORS.

See EVIDENCE, 14.

See Negligence, 1; Pleading and Practice, 7.

EQUITY.

- Notwithstanding the drastic provisions of the statute in regard to usury, cap. 434, Pub. Laws, 1909, as amended by Pub. Laws cap. 838, 1912, the borrower under a usurious contract before he can be given the relief of cancellation of the contract, must perform the moral obligation resting upon him and pay or offer to pay the principal of the loan with legal interest.
- Equity will enforce the usury law against the lender, and also for the protection of the borrower, in so far as such enforcement does not lead it to disregard those equitable principles, which as a court of conscience it must enjoin upon all suitors before it.
- 3. Although in law a mortgage executed by the borrower is of no effect as security for the usurious contract, in a suit by the borrower, equity will treat the mortgage as a valid security for the amount which it regards as justly due from the borrower to the lender.
- 4. Where it appears that a lender has violated the usury statute which fixes 30% as the highest rate that may be charged for interest on sums over \$50, no consideration of conscience would require a court of equity to hold that the borrower seeking relief, ought to pay more upon the loan than six per cent, the rate fixed by law in the absence of express stipulation.
- 5. Where it appeared upon bill in equity seeking relief from a usurious contract, that complainant had made payments largely in excess of legal interest upon the loan, the court should direct such application of the excess to be made as appears most beneficial to complainant. It was error to dismiss the bill on demurrer on the ground that it neither showed payment or made tender of payment, but the bill should have been held for hearing on its prayer to restrain a threatened sale, and if upon hearing the allegations of usury were sustained the court should direct the application of the payments in excess of legal interest, as should be for the protection of complainant, and give such conditional relief as might be required under the rules of equity in the circumstances of the case. Moncrief v. Palmer, 37.

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6. When a bill in equity charges actual fraud, no matter what other allegations it may contain, the complainant stands or falls on that charge alone, as no other issue is before the court. Grant v. Wilcox 94.

See Appeal and Error, 2-3.

ESTOPPEL.

See Dedication, 1. See Mechanics Lien, 2.

EVIDENCE.

- Where a bill of particulars set out charges for goods sold by plaintiff to defendant, it was error to permit plaintiff to introduce evidence of work performed upon the goods at defendant's request, as plaintiff should have been restricted in its proof to the claims set out in its bill. Star Braiding Co. v. Stienen Dyeing Co., 8.
- 2. Under Pub. Laws, cap. 1278, "An act to furnish the City of Providence with a supply of pure water," upon petition for assessment of petitioner's damages caused by the taking of his property in condemnation proceedings, as petitioner is entitled to compensation as of the date the city acquired title and was empowered to take possession, he should receive interest upon the amount of such compensation, until it is paid, not as a part of his damages but to indemnify him for the detention of the money after it became due but evidence in regard to the right of the city to demand payment for the use and occupation of the property by petitioner after the taking of title by the city is inadmissible as outside the only issue involved in the proceedings. Whitman v. Providence, 33.
- 3. On a probate appeal, evidence that the parents of testatrix were interested in a charity, to which testatrix gave a large bequest, was properly admitted as furnishing some reason for her own bequest. Andrews v. R. I. Hospital Trust Co., 118.
- 4. Where it appeared that witness was the purchaser of her husband's store at a mortgagee's sale, and a machine, the subject of the action, was neither mortgaged nor included in the sale, question as to the purpose of putting the store in the name of witness, was immaterial and properly excluded. Semonian v. Panoras, 165.
- 5. The action of the court in admitting and rejecting testimony as to telephonic conversations, dependent upon the evidence of the identity of the party at the other end of the wire was proper.
- 6. The action of the court in excluding evidence should not be regarded as reversible error, where the court permitted such excluded statements appearing in a subsequent portion of the deposition to be presented to the jury.
- 7. Where the admitted purpose of defendant was to obtain a monopoly of a commodity with the object of selling it at an artificially advanced and unreasonable price, and the sole controversy between the parties was whether the plaintiff acting through its agent knew of the ulterior purpose of the defendant and illegally combined with it to carry out such purpose or



- whether the plaintiff was merely pursuing its ordinary business as a commission broker without participation in the design of defendant, evidence offered by defendant as to acts and statements of its agent in corroboration of the admitted designs of the agent and the defendant, but in no way tending to support defendant's contention of an illegal combination with the plaintiff to further such designs, was irrelevant and inadmissible.
- 8. Upon the issue of a conspiracy to create a monopoly, the determination as to the admissibility of evidence as to the acts and declarations of one of the parties rested in the discretion of the court. If there was evidence in the case from which a jury might possible draw the inference that a conspiracy existed between the parties the court would be obliged to submit the question to the jury even though such inference would not be drawn by him and although he might feel that a verdict finding a conspiracy would be against the preponderance of the evidence and should be set aside, and in the state of the proof in the case at bar the justice could properly exercise his discretion and exclude evidence as to the acts and declarations of one of the parties although he felt constrained to submit the question of conspiracy to the jury.
- It is within the discretion of the court to regulate and restrain cross examination designed to test or discredit the sincerity of a witness. McNear, Inc. v. The Amer. & British Co., 190.
- 10. Evidence in an action for slander that defendant had at some time between six and ten years before the time alleged in the declaration made certain statements was too remote to be admissible, where it did not appear that defendant had thereafter habitually made similar statements up to within a reasonable time before the date alleged in the declaration.
- 11. The admission of testimony as to a rumor around a neighborhood in regard to certain facts and that it was rumored that the gossip had its origin with defendant, constituted reversible error. Hathaway v. Reynolds, 239.
- 12. Where the records of the State Board of Public Roads relative to registration of automobiles had been destroyed, it was error to permit witness to testify that he found out by conversation with a clerk of the Board that an automobile was registered in the name of deceased and that the license expired at a certain time. Arnold v. Barrington, 298.
- 13. In an action under the statute for death by wrongful act, evidence of standard life tables and tables showing the present value of a dollar for various terms of years were properly admitted. Burns v. Brightman, 316.
- 14. In a statutory action to recover for death of intestate through walking into an open elevator well, where the declaration charged a violation of the duty imposed by Gen. Laws, cap 129, § 16, evidence showing the lack of safety device prior to the accident was properly admitted, as the situation then was the same as at the time of the accident and continued unchanged. Graham v. Nye, 393.
- 15. The fact that a petitioner for divorce coupled an admission that he was the father of a child with the statement unquestionably false that respondent was its mother, will not result in such untruth as to the maternity of the child negativing his admission that he was the father and hence guilty of

- adultery when such finding is also supported by a mass of circumstantial evidence.
- 16. In a divorce proceeding, copy of birth certificate recorded in the public records, was properly admitted in connection with the testimony of the physician who had made and filed such certificate and also copy of baptismal record of the child made in a church, in connection with the testimony of the priest who made the record. Borda v. Borda, 337.
- 17. A statement made by a child two and a half years of age immediately after the happening, that defendant's dog had bitten her, the statement appearing to have been spontaneous and not premeditated, was admissible as a part of the transaction.
- 18. The fact that a child is too young to be a competent witness, does not preclude the admission in evidence of its declarations as part of the res gesta. Powell v. Gallivan, 453.
- 19. In considering the validity of an enrolled act of the legislature, depending for its proper determination upon the nature of the action of the houses of the general assembly the court may receive the evidence furnished by the public records embodied in the legislative journals, and the validity of an act of the legislature will not be impeached where such journals show nothing to overcome the presumption of the validity of the act. O'Neil v. Demers, 504.
- 20. In considering the validity of an act of the legislature the court will not assume that transactions of the legislature were otherwise than the journal states nor that the members did not appreciate the nature of the action of that body. O'Neil v. Demers, 504.

See Appeal and Error, 4.
See Constitutional Law, 13–14.
See Deeds, 1.

EXCEPTIONS, BILLS OF.

- Under Gen. Laws, cap. 298, § 17, providing that in a bill of exceptions the moving party "shall state separately and clearly the exceptions relied upon" the statement of an exception requires no reference to the validity of the exception but should be merely an allegation of the fact that it was duly taken.
- 2. The reasons for claiming error in the ruling of the court, are not properly included in the statement of an exception.
- 3. Exceptions which do not set out the ruling of the court, either in terms or by reference, but merely state the claim of the moving party as to the effect of the ruling of the court, will not be allowed.
- 4. As a justice of the Superior Court upon consideration of a bill of exceptions has authority to disallow or alter the bill, the Supreme Court on consideration of a petition to establish the truth of exceptions has the same power, and will alter the statement of exceptions contained in the petition to conform to the facts as shown in the transcript. Nichols v. Mason & Co., 43.

- 5. Where demurrer was sustained to special pleas and no exception taken to the decision, and the case went to trial and decision was given for plaintiff to which defendant filed exceptions, on hearing on bill of exceptions the special pleas and the facts alleged therein will not be considered. Gladding v. Atchison, 69.
- 6. By pleading to an action without objection to its form, and by proceeding with the trial without objecting thereto at any stage of the proceedings a defendant is precluded from raising such objection at the hearing of exceptions to the decision of the lower court. Gladding v. Atchison, 69.
- 7. A bill of exceptions may not include objections to the conduct of counsel in the trial of a case, except where the party has asked the court for appropriate action which has been denied when by exception to such denial of relief he may bring the ruling up for review. McNear v. Amer. & British Co., 190.
- 8. An exception "to the ruling of the court refusing to grant plaintiff's request to charge numbered 1, 2 and 3, page 265 of the transcript" offends against the provisions of the statute requiring a party to state in his bill the exceptions relied upon, "separately and clearly." Lucey v. Allen, 379.
- An exception cannot be sustained where no objection was made to the question and no motion was made to strike out the answer and it does not appear from the record whether the exception was to the question or answer. Powell v. Gallivan, 453.
- 10. A bill of exceptions should contain only an enumeration of the rulings and the exceptions thereto actually taken, in the form in which they were taken each stated separately and clearly; and should not contain averments of error in the decision of the superior court.
- 11. Where an objection to a decision of the lower court is one of law, which has no relation to any of the facts in the case not contained in the papers, and which solely concerns the construction of a statutory provision, no transcript need be filed, as it would be unnecessary for the determination of the exception before the court. Bannon v. Bannon, 468.
- 12. Except in clear cases in which there is no room for reasonable difference of judgment, the question of contributory negligence is one of fact and as such is in the first instance properly submitted to the jury. The question of the weight and the preponderance of the evidence is not properly raised on a motion for the direction of a verdict but can be and should be considered only by the justice in later proceedings upon motion for new trial, and such question will not be considered on exceptions by the appellate court. Woodward v. O'Driscoll. 487.
- 13. When a party has excepted to the denial of his motion for the direction of a verdict and after verdict against him the court has granted his motion for new trial, the appellate court will not consider his exception to the refusal of the lower court to direct a verdict in his favor. This settled rule of practice however is applicable only in cases presenting similar circumstances to the ruling case. Following Barstow v. Turner, 29 R. I. 100, and Malafronte v. Milone, 33 R. I. 460. Congdon v. Block, 293.

EXECUTIONS.

 Gen. Laws, cap. 325, § 1, as amended, does not prescribe either the mode or medium of payment of the board of defendants committed on execution to jail, and the acceptance of a valid money order by the keeper of the jail before the prisoner's board was due, was a payment within the meaning of the statute. Gingras v. Linscott, 112.

EXECUTORS AND ADMINISTRATORS.

See Pleading and Practice, 9-10.

EXTRAORDINARY WRITS.

See Writs, 2.

FALSE IMPRISONMENT.

See Malicious Prosecution, 4.

FOREIGN CORPORATIONS.

1. Where a foreign corporation through its agent took an order in this state, executed by defendant in this state and by the foreign corporation outside the state, the contract was made outside the state and was not within the provisions of Gen. Laws, cap. 300, § 42, relative to the appointment of a resident attorney. Swinehart Tire Co. v. Broadway Tire Ex., 253.

See Corporations, 1.

FRAUD.

See Equity, 6.

GAS.

See Public Utilities, 1-3.

GIFTS.

 Where a chattel was purchased in the first instance by a husband as a gift for his wife, no bill of sale or special act of delivery was necessary to give title to the dones. Arnold v. Barrington, 288.

GUARDIAN AND WARD.

- 1. There is no authority under Gen. Laws, cap. 321, § 12, for the allowance of counsel fees, to be paid by a guardian of a person of full age, out of the estate of the ward, for services in connection with a petition for leave to resign as guardian.
- 2. There is no authority for the allowance of counsel fees and expenses of experts under Gen. Laws, cap. 321, § 12, to be paid by a guardian of a person of full age, out of the estate of the ward, on a petition of the ward for release from guardianship.

3. Where the original guardian resigned and a petition was filed for the appointment of a new guardian, counsel fees for services rendered the ward in defending against the new appointment are within the provisions of Gen. Laws, cap. 321, § 12, it appearing that the ward was possessed of some mental capacity, and was entitled to have his wishes and interests considered in the appointment. Estate of Rathbun, 101.

HIGHWAYS.

See MUNICIPAL CORPORATIONS, 1-8.

HUSBAND AND WIFE.

 A wife cannot maintain an action of trespass on the case against her husband to recover damages from him on account of injuries sustained by her by reason of his negligence when she was living with him at the time she was injured and at the time of the commencement of the action. Oken v. Oken, 291.

See DAMAGES, 5.

INCOME.

See WILLS, 1.

INJUNCTIONS.

While the issuance of a preliminary injunction rests in the sound discretion
of the court, it will not be supported when it is clear that the court's discretion has been exercised in an illegal manner or in favor of a complainant
who has not made out a prima facie case for relief. Fritz v. Presbrey, 207.

See Constitutional Law, 7.

INSURANCE (LIABILITY).

- 1. A policy insured a physician and surgeon against "loss or disability as herein defined, resulting directly, independently and exclusively of any and all other causes from bodily injury effected solely through accidental means." The policy provided that "the insurance hereunder shall not cover any injury, fatal or non-fatal, sustained by insured while participating in or in consequence of having participated in aëronautics, from ptomaines or from disease."
- Insured died from erysipelas, through an open boil becoming infected with the erysipelas germ. Deceased had treated erysipelas cases while suffering from the boil.
- Held, that the death of insured was the result of disease and not of bodily injury effected solely through accidental means.
- 2. In determining that an injury occurred by "accidental means" it should appear that the cause or means governed the result and not the result the cause; and however unexpected the result might be, no recovery should be allowed under such a provision unless there was something unexpected in the cause or means which produced the result. Kimball v. Mass. Accident Co., 264.

See Constitutional Law, 1.

INTEREST.

See Equity, 4; Evidence, 2.

INTERNATIONAL LAW.

See Constitutional Law, 16-17.

INTERPLEADER.

 Complainant as counsel in two actions for personal injury to respondents, who at the time were husband and wife, recovered judgment in favor of the respondents. Thereafter respondents made various claims as to payment of counsel fees and expenses of suit against one another and complainant filed interpleader and a consent decree was entered permitting him to pay into court the proceeds of the two judgments after deducting his fees charged respectively against each judgment.

Decree was entered before answers were filed.

- Held, that from the answers it appeared that interpleader would not lie, since the claim of one respondent was simply for breach of contract against the other, but as the decree was not appealed from and was final the parties could not be placed in statu quo by dismissing the bill, and although the case could not be disposed of as one of interpleader, the bill should be retained to make an equitable disposition of the fund.
- Held, further, that the portion of the fund to which each respondent was entitled when it was paid into the court should be returned to them; the costs and expenses of complainant retained by him with consent of respondents upon filing of the bill and the fees taxed by the clerk should be borne equally by respondents and neither should recover costs.
- Interpleader cannot be maintained when the demand of one party is against
 the other personally and not upon the fund in dispute. Stiness v. Henderson, 514.

INTOXICATING LIQUORS.

1. Defendant a wholesale liquor dealer entered into a contract with plaintiff to purchase a retail liquor saloon and a liquor license granted to X. for \$4,000; one hundred dollars to be paid on the execution of the agreement and four hundred dollars at the time the license was transferred to plaintiff and the balance on mortgage. Plaintiff paid the \$100 entered into possession of the saloon and conducted the business for some months. Defendant applied for a transfer of the license standing in the name of X. to plaintiff and the licensing board voted to transfer it but plaintiff never signed the bond and the license was never transferred. During the time plaintiff ran the saloon he purchased his liquors from defendant and after abandoning the business brought suit against defendant under Gen. Laws Cap. 123, § 60, to recover the money paid defendant for the liquors. The contract between the parties provided that in case plaintiff refused to wholly perform, the money paid by him to defendant on account of the purchase price "shall be retained as liquidated damages."—

Held, that defendant could not urge in set-off the \$400 payment due when the license was transferred, even if such contention was proper, since under the agreement defendant's damages were liquidated.

Held, further, that plaintiff never became a licensed dealer.

Held, further, that in this form of action plaintiff was not seeking to recover a penalty, but his right of action arose at the time he paid the money, not under the statute but at common law to recover back the money because it was received without consideration.

Held, further, that as plaintiff was not seeking to recover a penalty it was unimportant whether Pub. Laws, 1922, cap. 2231, or the so-called Volstead Act (both passed after the rights of the parties became fixed) repealed any of the provisions of cap. 123, but assuming they did, the repeal did not take away the common law action to recover money paid without consideration and further such repeal could not supply a consideration where none existed or render criminal an act of the plaintiff which was not prohibited when done. Grande v. Eagle Brewing Co., 424.

See Constitutional Law, 18-20.

JITNEY BONDS.

1. Cap. 93, ordinances of the City of Providence passed under the authority of Pub. Laws, cap. 1263, (1915), regulating the licensing and operation of motor buses, affects the operation of such motor vehicles only within the limits of the City of Providence, and has no extra territorial effect, and the bond required by said ordinance to be given to said city in order to procure a license to operate a motor bus, covers damages sustained on account of the negligence of the principal or his employees in the conduct of the business only within the limits of said city. City of Providence v. Laurence, 246.

JUDGMENTS.

- During six months after judgment by default the jurisdiction to grant relief
 is concurrent in the Supreme Court and the Superior Court or any district
 court in which such judgment has been entered.
- A petition to remove default is addressed to the judicial discretion of the court and upon review the determination of an inferior court will not be disturbed unless it appears that there has been an abuse of discretion or that the determination is based upon an error of law.
- 3. In granting relief after default the remedy will be withheld unless the party as a part of the cause shown, makes it appear, if he be a defendant, that he has a defence which he desires to present in good faith in case a trial is granted and that it is one which if established should have an effect upon the result. It should appear that the defence is prima facie meritorious.
- 4. It is the duty of a court in passing on a petition to remove a default, to determine whether or not the defence urged is frivolous or one that amounts to a defence in law, and whether or not it is being urged in good faith and the court should not pass upon the sufficiency of the evidence to support the defendant's claim. Milbury Mfg. Co. v. Rocky Point Co., 458.

See BANKRUPTCY, 2.

See Constitutional Law, 13-15.

See Divorce, 23; Pleading and Practice, 6; Shell Fisheries, 3.

JUDICIAL NOTICE.

See Constitutional Law, 13-15.

JURISDICTION.

See Pleading and Practice, 11-14.

JURORS.

1. Where it does not appear that a party was in any way prejudiced by the manner in which the jury list was made up, a motion to quash the list was properly overruled, for a party cannot demand that a juror shall be a resident of any particular city or town of the county, for if he receives an impartial trial, that is all he can require. Andrews v. R. I. Hospital Trust Co., 118.

See NEW TRIAL, 4.

LANDLORD AND TENANT.

- Where a monthly tenant after notice to quit holds over it is optional with lessor to treat him as a trespasser or tenant from month to month, an election to treat him as tenant being inferable from any unreasonable delay to proceed against him as a trespasser, as well as from words or acts directly recognizing him as tenant.
- 2. Where lessor elects to sue lessee in assumpsit for use and occupation of premises after the end of the term, he waives his right to afterwards take the inconsistent position of treating lessee as a trespasser during the same period and to sue in trespass. Arnold Realty Co. v. Toole Co., 83.
- 3. No particular form of notice is necessary to terminate a tenancy. The notice will be sufficient if it is in writing and informs the tenant that he is required to vacate the premises at the end of his term and is given before the commencement of the latter half of his term. It need not state when the term ends, as a tenant for a term must be presumed to know when his term commences and when it ends.
- 4. The fact that a tenant who was notified to quit "at the end of your occupation month which will occur next after the expiration of fifteen days from the date hereof" was entitled to sixteen days' notice is of no importance where as a matter of fact the time given was sufficient, to comply with Gen. Laws, 1909, cap. 334, § 4. Nass v. Garniss, 162.
- 5. A lease provided that at its termination "said lessors will execute to said lessees another lease to run for a period of five years or inlieu thereof, will pay said lessees the appraised value of such improvements as said lessees may at their own expense have added to said premises". At the end of the term lessees continued to occupy and paid the same rent for about twenty-one

months without anything being done, about a new lease or paying for improvements, and then lessors gave notice to lessees to vacate.

- Held, that a covenant to renew in the absence of a covenant to accept confers a privilege which is an executory contract and until the exercise of the privilege by the party upon whom it is conferred he cannot be held for the additional term, and therefore as lessees never became bound to pay reat for another term of five years they never acquired the right to occupy for another such term.
- Held, further, that lessees became tenants from year to year which tenancy was terminated by the notice to quit under sec. 3, cap. 334, Gen. Laws.
- Quære; as to any rights of lessees in equity for specific performance. Pennington v. Glover, 250.
- 6. A lease provided that lessee should have an option for a renewal for a further term and that if lessee "should ask for a renewal at the termination of five years from the date hereof, the conditions governing the extended period shall be the same with the exception" of the rent, and also provided that upon failure of lessee to pay any installment of rent within five days after the first of the month lessor should be at liberty to take immediate possession of the premises. Lessee two days after the original termination of the lease stated orally to lessor that he wished to renew the lease for the further period:—
- Held, that the only act that lessee was required to do was an election to continue the tenancy which he was not called upon to make prior to the termination of the lease, and a fair construction of the lease gave lessee a reasonable time after the termination of the lease to make such election, and the election within two days was within a reasonable time.
- Held, further, that the election was not required to be in writing.
- Held, further, that the agreement was one for the extension of the original lease rather than for a renewal of a lease to be evidenced by a new lease, although the option was expressed to be a renewal.
- Where a lease provided for its extension at option of lessee, the tenant having made his election holds the premises for the full term under the original lesse. . Caito v. Ferri, 261.
- 8. Whether a tenant attorned to a new landlord is a question of fact, and where it appeared that the tenant received legal advice that by paying rent to the new landlord he would waive his rights and nevertheless paid rent several times although asserting that he did not waive his rights in so doing and that the landlord at request of tenant made repairs on the premises, a finding that tenant attorned was warranted. Palais v. Duhamel, 444.

See Actions, 2.

See Mortgages, 1.

LARCENY.

See CRIMINAL LAW, 1.

See LIBEL, 5.

LIBEL.

- 1. In an action for libel it was error to leave to the jury to decide whether a circular was libelous under instructions that the meaning of the word "steal" in the circular was to be determined by a consideration of the whole document, from which it was for the jury to say whether or not it was a malicious attempt to charge a crime or whether it was simply the use of exuberant language to express a very volcanic state of feeling.
- An accusation is libelous per se, which falsely charges an offence which although not a crime at common law, if proved may subject the party accused to a punishment not ignominious but bringing disgrace. Laudati v. Stea. 303.
- 3. A defendant is liable for publication of a libel even if he gave out but one copy of a circular of which a large number were printed.
- 4. Where a circular made a grave charge against plaintiff by name, defendant cannot escape liability on the ground that the naming of plaintiff was a mistake and another person was intended, for where the words were clear there was no need to refer to extrinsic evidence to determine to whom the writing was intended to apply and the mistake could easily have been discovered by defendant by reading the circular. Laudati v. Stea, 303.
- 5. Accusing one of stealing is charging the crime of larceny or embezzlement which is libelous per se, and there is no occasion to allege or prove special damages but accused is entitled on proof of defendant's responsibility, to recover compensatory damages.
- 6. The award of punitive damages in libel and slander is discretionary with the jury, where allowable, and they are properly allowed when actual malice is shown or a recklessness equivalent to actual malice.
- 7. A defendant in libel is bound by the natural and ordinary consequences of his acts and his intent is no defence but is properly to be considered only in the assessment of damages. Laudati v. Stea, 303.

See Damages, 6-8.

LIENS.

See Assignment for Benefit of Creditors, 1-2.

LIQUIDATED DAMAGES. See Intoxicating Liquors, 1.

LOST PROPERTY.
See CRIMINAL LAW, 1.

MALICIOUS PROSECUTION.

1. In an action for malicious prosecution, a plaintiff must establish by a preponderance of the evidence that defendant caused or assisted in causing the criminal prosecution to be instituted against him; therefore in a joint action, a verdict was properly directed for a defendant who simply reported truthfully facts to the police authorities and a defendant police officer who re-

- ported by direction of his superior officer the result of his interviews with plaintiff and other witnesses.
- 2. To warrant recovery in an action for malicious prosecution plaintiff must establish by a preponderance of the evidence that in prosecuting him, defendant was acting without probable cause and also with malice toward him, and while the question of malice is ordinarily for the determination of the jury, it should not be submitted to them, in the absence of facts which would warrant a finding of malice.
- While malice may be inferred from want of probable cause, this inference cannot be permitted, when the evidence showing a lack of probable cause also shows the absence of both ill-will and oppression. Atkinson v. Birmingham, 123.
- 4. An action will not lie against a defendant either for false imprisonment or for malicious prosecution where he simply made complaint of the commission of a crime and the proceedings against plaintiff were begun by the sheriff acting on his own judgment.
- 5. Inaccuracy in a criminal complaint in the allegation of the person defrauded is immaterial in proceedings brought by the defendant in such criminal complaint charging false imprisonment and malicious prosecution as the real question is not who was defrauded but who committed the fraud.
- 6. In a criminal complaint the allegation of the date of the commission of the crime is formal and the prosecution is not bound thereby and an error in this regard is not material in an action by the defendant in the criminal complaint charging false imprisonment and malicious prosecution.
- 7. An action for false imprisonment will not lie when the arrest is made under process valid on its face and issued by a court of competent jurisdiction, even if the investigation by the officer was insufficient, as negligence of the officer does not invalidate the process, the gist of the action being the unlawful detention of another without his consent, and malice not being an essential element of this form of action.
- Where the facts are not in dispute, the question of probable cause is one of law.
- Where an officer after an investigation as to guilt of the accused, had reasonable grounds to believe him probably guilty, an action for malicious prosecution will not lie.
- 10. An honest and reasonable belief as to guilt of accused is a valid defence to an action for malicious prosecution.
- 11. Where an officer stated the case fairly to his counsel and acted in good faith on the advice of counsel, he is not liable for malicious prosecution. Lee v. Jones, 151.
- 12. Plaintiff is not barred from maintaining an action for malicious prosecution by the fact that he consented to the discontinuance of the criminal complaint against him, where, after notice to his attorney that the prosecutor considered plaintiff innocent of the charge against him, the attorney asked the prosecutor if he would have the case dismissed, and it was discontinued. Distinguishing Russell v. Morgan, 24 R. I. 134. Lee v. Jones, 151.

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- 13. It is a defence to an action for malicious prosecution, if the prosecutor acts upon the advice of a competent disinterested and regularly admitted practicing attorney in good standing that probable cause for commencing prosecution exists, provided the prosecutor honestly believes the accused is guilty and makes a full, fair, frank and free disclosure of all the circumstances to the counsel who advises him.
- 14. Whether a prosecutor acted upon advice of counsel and whether he made a complete disclosure of all the facts and circumstances are questions of fact for the jury. The mere statement of a prosecutor that he made a full disclosure is not conclusive; what he stated should be proved.
- In an action of malicious prosecution, malice may be inferred from lack of probable cause. Kitchen v. Rosenfeld, 399.

MANDÀMUS.

See Pleading and Practice, 11.

MASTER AND SERVANT.

See Automobiles, 22-24.

MECHANIC'S LIEN.

July 1, B. gave C., a contractor, money to buy a lot of land and to build a
house thereon. July 28 petitioner contracted with C. to dig a cellar. July 30,
C. purporting to act for B. secured a permit to build whereby authority was
granted to B. as owner of the land. At the time petitioner did the work,
August 1, on the cellar the land belonged to X.

August 16, deeds to the wife of C. and from her to B. were recorded.

- Held, that assuming that a mechanic's lien lies on an equitable interest in real estate which is not decided, there was no evidence that B. when petitioner did the work had any title either in law or equity to the land and petitioner's claim for lien must be dismissed.
- 2. A mechanic's lien cannot be maintained on the ground of an equitable estoppel, arising out of the description of respondent as owner of the land in a building permit, when an examination of the records would have disclosed the true ownership and no representations were made to petitioner by respondent or by anyone authorized by him. Sullivan v. Bradic, 447.

MONOPOLY.

See EVIDENCE, 7-8; TRIAL, 5-6.

MORTGAGES.

1. A mortgage of personal property contained a provision "upon default of any of the terms of the mortgage, this instrument shall operate as a transfer of any lease or tenancy that he (the mortgagor) may have in said premises at such time." The mortgagor was a tenant under a lease containing a covenant against subletting or assigning the whole or any part of the premises without the written consent of lessor. The mortgage foreclosed the mortgage and thereafter the lessor executed a lease of the premises to

- a third party and mortgagor brought his action for breach of covenant for quiet enjoyment. When the mortgage was foreclosed the leasehold interest of the mortgagor was not offered for sale.
- Held, that before the transfer of the leasehold interest of the mortgagor could be said to have any effect, it must appear that the mortgagee assumed dominion over the premises, warranting lessor in asserting his right of possession. Librandi v. O'Keefe, 49.

See Assignment for Benefit of Creditors, 1-2.

MOTOR BUS.

See Constitutional Law, 16-17.

MUNICIPAL CORPORATIONS.

- 1. To show the establishment of a public highway under the common law, the following facts must be proved: (a) the right of the public to use the highway, established by immemorial or long continued public use; (b) the liability of the town to repair the highway, which is created only by some act of acquiescence or adoption by the town, as by assumption by the town of the duty to repair the way and the actual repairing of the same from time immemorial.
- The significance of such repairs as were made by a town to a small country highway should be judged with reference to the nature and extent of repairs customarily made by the town on other similar highways at different times.
- Of necessity in many cases adequate proof of immemorial repair can only be made by proof of a number of different and separate acts by the town.
- 4. A town is held liable for injury to one traveling upon a public highway if it had reasonable notice of the defect, or might have had notice by the exercise of proper care and diligence on its part.
- 5. Charge that a town was not required to work a road to its full width, but was only required to keep it safe for travelers for a suitable width and that having taken a view of the way it was for the jury to decide whether the way had been properly maintained for a sufficient width, was correct. Williams v. Allen, 14.
- 6. By resolution of the Legislature, a local highway, between fixed boundaries was made a part of the State highway system. At two places in the town, this local highway crossed two State roads, whereby for short distances the local highway and the two State roads coincided. These two junction portions were constructed and maintained by the State.

Held, that the maintenance of such portions by the State had reference to their connection with the State highways and not to the local highway.

Held, further, that although cap. 1904, pub. laws, 1920, made an annual appropriation to be paid to towns for the maintenance of local highways which have been adopted as a part of the State highway system but not constructed, such participation by the State did not thereby make such highways State roads for the maintenance of which the State was responsible. Duffney v. Clarke, 495.

- 7. In an action against a town for failure to keep a public highway safe and convenient for travellers, the question of contributory negligence was properly left to the jury.
- 8. Where plaintiff was injured through coming into contact with the handle of a gasoline pump, which was placed in the sidewalk under the direction of a town official, and it appeared that the town had notice of the practice of the owner of the pump to leave the handle on the pump where it projected over the sidewalk, in an action against the town for personal injury through coming into contact with the handle after dark:—
- Held, that the proximate cause was not the temporary failure of the owner to remove the handle but was that of the town after notice to take appropriate action, thereby in effect permitting a dangerous obstruction to travel to remain on the sidewalk. Duffney v. Clarke, 495.

NE EXEAT. See Writs, 1.

NEGLIGENCE.

1. Gen. Laws, cap. 129, § 16, providing that every passenger elevator shall be fitted with some suitable device to prevent the elevator car from being started until the door opening into the shaft is closed, covers not only the case of a moving elevator and the starting of the car before entrance or exit is accomplished but also requires that the door cannot be opened from the outside when the elevator is at rest. Graham v. Nye, 393.

See Automobiles, 9-21; 23-28.
See Carriers, 1-2.
See Evidence, 14;
See Husband and Wife, 1.
See Municipal Corporations, 7-8.
See Pleading and Practice, 7.

NEW TRIAL.

- The denial of the defendant's motion for a new trial is not controlling where from the language of the trial court it may be reasonably inferred that the court found but little to support the plaintiff's case. Barrett v. R. I. Co., 147.
- 2. The court would not be warranted in setting aside a verdict because of refusal of the trial court to submit to the jury the question whether defendant's agent against instructions delivered the defendant's executed agreement to the plaintiff, where the overwhelming preponderance of the evidence was against the fact that plaintiff had knowledge of the instructions at the time of the delivery to him of the agreement and where at the time of delivery defendant's agent also furnished plaintiff with a certified copy of a resolution of defendant's directors authorizing the chairman of the board to sign the contract. McNear v. Amer. & British Co., 190.

- 3. On motion for new trial the trial court is justified in considering and it is his duty to consider the credibility of witnesses and what in his view is the preponderence of the evidence and if he believes the verdict to be unjust he should grant a new trial. Wilcox v. Swan, 236.
- 4. Where on petition for new trial, on the ground that one of the jurors was not indifferent in the cause and had held a conversation with the husband of the plaintiff during the course of the trial the trial court passed on the question and denied the petition his action will not be disturbed unless it is shown that he abused his discretion. Hathaway v. Reynolds, 239.
- 5. All grounds contained in the motion for new trial should be considered by the trial justice, but where the appellate court does not have the benefit of the opinion of the trial court on the ground of liability, the fact that he approved the amount of damages awarded by the verdict warrants the inference that he approved the verdict on the ground of liability. Powell v. Gallivan, 453.
- 6. Where the trial justice has deceased so that a verdict lacks his approval, on exceptions to a pro forma denial of a motion for new trial by another justice, the evidence on the question of negligence being conflicting, and not very strongly preponderating against the verdict and the verdict being one that fair-minded men might have found, it will not be disturbed. Wells v. Chase, 492.

See EXCEPTIONS, 12.

NOTICE.

See MUNICIPAL CORPORATIONS, 4.

NOTICE TO ATTORNEYS. See Trial, 8-9.

ORDINANCES, CONSTRUCTION OF. See Constitutional Law, 5-9.

PENALTIES.

See Intoxicating Liquors, 1.

PLEADING AND PRACTICE.

- 1. It was not error under Gen. Laws, 1909, cap. 283, § 26, to permit a plaintiff where the writ and declaration were in assumpsit, the declaration alleging a breach of a lease containing covenants, to file additional counts in covenant after the completion of the testimony, the purpose of the statute being to save litigants from the disadvantage arising from mistaken forms of action, and the matter of the amendment also being in the discretion of the trial court. Librandi v. O'Keefe, 49.
- 2. In an action for breach of contract, where there was no evidence that plaintiff did not in good faith endeavor to strictly perform, and defendant retained and used a portion of the material installed by plaintiff, although there may not have been strict performance by plaintiff, nevertheless where the labor and materials furnished by plaintiff are clearly in excess of any damage

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shown by the evidence that defendant suffered, defendant will not be permitted to be enriched at the expense of the plaintiff and plaintiff may recover under a quantum meruit. Lawton v. Newport Industrial Co., 91.

- 3. Where merchandise being transported on a truck was in the exclusive control of defendant and the manner in which it was being transported was within the knowledge of defendant but unknown to plaintiff and the accident was one that does not ordinarily happen when due care is used, reasonable certainty on the part of plaintiff in stating his case only is required. Golden v. Greene Co., 226.
- Indefiniteness in the allegation of negligence is cured by verdict. Golden v. Greene Co., 226.
- Want of capacity to sue should be set up by a plea in abatement and is waived by pleading to the merits. Swinehart Tire Co. v. Broadway Tire Ex., 253.
- 6. An action of debt on a decree of a court of another State does not state a case where it does not appear by the declaration that the decree is an enforceable judgment in the State where it was rendered. Hewett v. Hewett. 308.
- 7. In a statutory action to recover for death of intestate through walking into an open elevator well, the declaration charged a violation of the duty imposed by Gen. Laws, cap. 129, § 16, which provides that every passenger elevator shall be fitted with some suitable device to prevent the car from being started until the door or doors opening into the shaft are closed, and that as a consequence the operator moved the car while the door opening into the shaft on one of the floors was open and deceased walked through the open door, the leaving of the door open was the proximate cause of the accident; the violation of the statutory obligation was continuous and the allegation to this effect in the declaration properly stated a cause of action. Graham v. Nye, 393.
- 8. Where to an action of covenant commenced in a district court the defendant entered his appearance, so far as it can be considered that there was any issue on a claim of jury trial before the superior court, it was solely that which arises on the plea of non est factum, which has sometimes been treated as in the nature of the general issue. Greenstein v. Rosenstein, 407.
- 9 In an action against X. administrator of Y. where the declaration containing the common counts alleged that defendant was indebted to plaintiff and a promise by defendant to pay, with no allegation of any dealings either with intestate or his estate or any indebtedness of the estate, there is no basis for any judgment against the estate and the words "administrator &c" are simply descriptio personæ, and can properly be treated as surplusage.
- An agent who has an interest in the proceeds of the sale is entitled to sue in his own name. Huot v. Osler, 471.
- 11. Upon entering a writ of trespass and ejectment in a district court plaintiff filed a claim for jury trial. Defendant during the session of the court answered the case and filed a special appearance "for the purpose of demurring to said declaration." One week after the entry day, the cause was



certified to the superior court which remanded it to the district court for want of jurisdiction:—

- Held, that under Gen. Laws, cap. 286, §§ 7 and 8 in connection with § 5, providing that in such an action either party may claim a jury trial on entry day and if the case be answered during the session of the court it shall at once be certified to the superior court, the provision for certification is mandatory, and a district court is not justified in retaining such case for any purpose.
- Held, further, that the case should have been certified on entry day, and when it was certified on the following week such certification should have been considered as of the entry day, and the superior court should have retained jurisdiction.
- 12. The failure of a clerk of a district court to certify a case upon a claim for jury trial at the time required by statute, does not affect the jurisdiction of the superior court, and if the case is later certified whether voluntarily or by mandamus proceedings, it should be treated as far as circumstances will permit as though duly certified in accordance with the statute.
- 13. Upon entering a writ of trespass and ejectment in a district court plaintiff filed a claim for jury trial. Defendant during the session of the court answered the case which was continued one week "for hearing on demurrer."
- Held, that while the positive requirement of the statute for certification admitted of no exception, such certification was in effect a transfer of the entire case to the superior court, where it should be tried on all issues of law or of fact which may arise between the parties. Durfee v. District Court, 462.
- 14. Although the language of Gen. Laws, cap. 287, § 3, as amended by Pub. Laws, cap. 2184, giving to parties in any case certified to the superior court from a district court on claim of jury trial, the right to file further pleas within 10 days from certification, is general, it is so inconsistent with the procedure in trespass and ejectment prescribed by cap. 286, § 8, that neither § 3 of cap. 287 nor the decision in Bates v. Colvin, 21 R. I. 57, construing said section is applicable, to such cases. Durfee v. District Court, 462.

See Actions, 3.

See Election of Remedies, 1-2; Exceptions, 5-6.

POLICE POWER.

See Constitutional Law, 4-9.

PRINCIPAL AND AGENT.

1. Where X. was in charge of a branch store of a company, and for several months had sold goods to plaintiff, although in much smaller amounts than the order in question, but sometimes in excess of the stock carried in the local store, and a large order from plaintiff was accepted by him, and thereafter plaintiff wrote defendant demanding compliance with the conditions of the order, and at no time prior to the trial did defendant suggest that X. had no authority to bind it, or that a contract had not been entered into, and a portion of the order was actually delivered.—

- Held, that it was a question for the jury whether or not a contract was entered into between the parties.
- 2. Where one knows that another, believing that former's agent had authority entered into an agreement with the agent and was relying upon the agreement and remains silent as to the lack of authority in the agent, he is bound by his own conduct in remaining silent. Screw Machine Products Co. v. Cutter and Wood Supply Co., 409.
- 3. In an action for breach of contract where plaintiff relied upon the apparent authority of the agent of defendant, question asked agent by defendant as to whether or not he had authority to accept orders in as large quantities as the order given, was properly ruled out, for if the principal gave the agent any secret instructions such instructions were not brought to the attention of the plaintiff and were not binding upon him. Screw Machine Products Co. v. Cutter & Wood Supply Co., 409.

See Automobiles, 25-26; New Trial, 2; Pleading and Practice, 9-10; Trust Funds, 1-2.

PROBATE LAW.

- 1. Under the provisions of Gen. Laws, 1909, cap. 317, § 1, giving to town councils the right to direct the town treasurer to take possession of any real or personal estate upon the death of any person who shall leave no heirs or legal representatives to claim the same, a town council passed a vote directing the town treasurer to take such possession. This was not immediately done with the exception of some real estate and thereafter upon petition of a creditor an administrator was appointed who settled the estate and by direction of the probate court turned over the balance of the estate to the town treasurer. The appellants filed their petition in the probate court praying that the estate be turned over to them as entitled thereto which petition was dismissed.
- Held, that the failure of the town council to take immediate possession of the personal estate did not debar it from the exercise of that right whenever in its judgment it became desirable to do so, and that having accomplished the final settlement of the estate, and decreed that the balance be turned over to the town the probate court had no further jurisdiction in the matter. Clarke v. East Providence, 142.
- 2. The clear intention of Sec. 7, cap. 1787, Pub. Laws, 1919, providing that whenever an intestate dies without issue leaving a husband or wife surviving, "the real estate . . . shall descend and pass to the husband or wife for his or her natural life. The probate court . . . may also in its discretion, if there be no issue as aforesaid, . . . allow and set off to the widow or husband in fee real estate of the decedent . . . to an amount not exceeding five thousand dollars in value," was to give to the surviving spouse an interest in all of the real estate of whatsoever nature of the deceased spouse. Fischer v. Scott, 368.
- A vested interest in remainder expectant upon a life estate is "real estate" within the meaning of Pub. Laws, 1919, cap. 1787, § 7. Fischer v. Scott, 368.

PROHIBITION, WRIT OF.

- 1. The court will not by the extraordinary and discretionary writ of prohibition restrain a justice of a lower court from the determination of a matter within his general jurisdiction because the petitioner fears that the action of such court may be adverse to him or erroneous, and even where the jurisdiction of the inferior tribunal is questionable or plainly lacking the court will assume that such tribunal will pass correctly upon the question of its own jurisdiction, but the court will leave the parties to their ordinary methods of review, unless it appears upon the face of the record that the inferior tribunal is without jurisdiction and that if it should assume jurisdiction a decision therein might work irreparable injury. Stevens v. Superior Court, 282.
- 2. The ordinary office of a writ of prohibition is to restrain an inferior tribunal from acting without jurisdiction or in excess of its jurisdiction. The writ will not be granted where the petitioner has an adequate remedy by review, if such tribunal should so act. *McLaughlin* v. *McLaughlin*, 429.
- 3. Where after decision for a petitioner in divorce, and before entry of final decree petitioner filed notice of her discontinuance of the petition which the court refused to permit and respondent moved for entry of final decree which was opposed by petitioner, while the superior court has jurisdiction of the subject matter and of the parties, yet because of the peculiar nature of divorce proceedings, petitioner might be left without adequate relief by the ordinary methods to review any error of the court in entering the decree, and a petition for writ of prohibition is an appropriate medium to bring the threatened action of the court up for review. McLaughlin v. McLaughlin, 429.

PUBLIC ACTS.
See Evidence, 19-20.

PUBLIC UTILITIES.

- Gen. Laws, cap. 345, § 53, providing a penalty for wilfully furnishing a
 meter which does not correctly register the quantity of gas consumed or
 for collecting a larger sum for gas than appears to be due upon inspection
 of the meter, does not penalize the collection of a service charge.
- 2. Upon appeal from an order of the Public Utilities Commission, finding service charge, for use of a gas meter, reasonable, evidence considered and held that such charge was legal, and as it applies to all consumers alike, it cannot be held to be unjustly discriminatory.
- 3. Upon appeal from an order of the Public Utilities Commission finding that a reduction in standard of gas under the conditions existing was necessary evidence considered and appeal dismissed. Rivelli v. Providence Gas Co., 76.

REAL ESTATE. See Probate Law, 2-3.

QUASI CONTRACTS.
See Pleading and Practice, 2.

SALES.

- Where a contract for the sale of ice to be harvested by the seller during a
 certain period named a minimum price and provided that in case the seller
 received a bona fide written offer from third parties of a greater price, the
 buyer was required to pay one-half of the increase or forfeit the amount of
 ice for which such offer had been made, the seller was not required to submit
 the offer for the inspection of the buyer.
- 2. Where a contract for the sale of ice to be harvested by the seller during a certain period named a minimum price and provided that buyer should pay in addition thereto one-half of the difference between such price and the price offered the seller by bona fide written offer of a third party or forfeit the ice so offered to be bought and the seller gave notice to the buyer of the receipt of offers the buyer was thereupon required to elect whether to pay the increased price or forfeit his right to the ice, although the notice did not state that the offers were bona fide and in writing, where the buyer made no objection to the form of the notice given him by seller.
- 3. In an action by a buyer for failure to deliver, following the buyer's failure to elect between paying an increased price or forfeiting the right to ice on the seller's receipt of bona fide written offers from third persons to purchase ice at an increased price, under the provision of the contract requiring him to do so, in which action it was claimed that offers which the seller claimed to have received from third persons were not in fact bona fide, instruction to the jury that seller offered to have the bona fide character of the offers ascertained by certain designated persons, and that buyer offered no constructive criticism of the bona fide character of the offers, and that seller was not asked, nor was any suggestion made by the buyer as to what such an examination should be, held not error, in view of the uncontradicted testimony. Prov. Ice Co. v. Bowen, 173.
- 4. Where a buyer had requested the seller to ship only the amount of goods requested by third persons, the buyer could not complain that the seller shipped less than the amount per day called for by the contract where the third person called for less than such amount.
- 5. Where the contract of sale of ice to be harvested by the seller during a certain period named a minimum price and provided that the buyer should pay in addition thereto, one-half the difference between such price and the price offered the seller by a bona fide written offer of a third person or should forfeit the amount of ice covered by such offer, and where the buyer on receiving the notice from the seller of such offer claimed the right to inspect the offer to ascertain its bona fide character and on the seller's refusal to submit the offer for inspection, the buyer did not elect to take the ice at the increased price, the seller was justified in concluding that the buyer did not intend to decide whether it would forfeit the ice until after it was permitted to inspect the offer.
- 6. In an action by a buyer for failure to deliver ice under the contract of sale of a portion of the ice to be harvested by the seller during a certain period, naming a minimum price and providing that the buyer should pay in addition thereto, one-half the difference between such price and the price offered

by a bona fide written offer of a third person or forfeit the ice covered by such offer, in which the defense was that the buyer had forfeited the ice remaining to be delivered under the contract by his failure to elect to take the ice at the increased price on the seller's receipt of offers from third persons, a refusal to charge that the buyer was entitled to delivery of the ice not forfeited, at the minimum price, was not error where the buyer had forfeited the amount of ice remaining to be delivered under the contract.

- 7. Where a contract of sale of a portion of the ice to be harvested by the seller during a certain period named a minimum price and provided that the buyer should pay in addition thereto, one-half of the difference between such price and the price offered the seller by bona fide written offers of third persons or forfeit the ice covered by such offers, seller was not required to dispose of the ice not covered by the contract, before requiring the buyer to elect on receipt of third persons' offers.
- 8. In an action by a buyer for failure to deliver ice under a contract of sale of a portion of the ice to be harvested by the seller during a certain period, naming a minimum price, and providing that the buyer should pay in addition thereto one-half the difference between such price and the price offered by bona fide offers of third persons or forfeit the ice covered by said offers, in which the defense was that the buyer had forfeited the ice remaining to be delivered under the contract by his failure to elect to take the ice at the increased price on the seller's receipt of offers from third persons the question of whether seller had bona fide offers in writing from third persons was one of fact for the jury.
- 9. Where a contract of sale of a portion of the ice to be harvested by the seller during a certain period named a minimum price and provided that the buyer should pay in addition one-half of the difference between such price and the price named in bona fide written offers of third persons or forfeit the ice covered by such offers and where on receipt of such offers from third persons the seller had sufficient ice in addition to that covered by contract with buyer, to sell to third persons, the seller's acceptance of offer before giving buyer notice thereof did not preclude him from requiring the buyer to elect whether to pay the increased price or forfeit the ice. Prov. Ice Co. v. Bowes, 173.

See Conditional Sales.

SEALS.

See Actions, 3.

SHELL FISHERIES.

1. An action was brought against the shellfish commissioners as individuals to recover the surplus proceeds from the sale of oyster leases after sale by the commissioners under Gen. Laws, cap. 203, § 26. The leases contained covenants against assigning the premises without the written consent of the commissioners. To the action defendants filed a plea in set-off alleging in part that certain other leases, not under seal, were taken by a third party as agent for the plaintiff who was an undisclosed principal.

- Held, that the doctrine of undisclosed principal was not applicable and it was immaterial whether the leases were under seal or not, for admitting such claim the result would be to make the statutory provisions against assignment inoperative.
- Held, further, that the claims in set-off were claims of the State and not of the commissioners and as they were not claims which belonged to defendants in their own right for which they might maintain a suit in their own names, they were not properly subjects of set-off in the action.
- 2. The duties of the Shellfish Commissioners under sec. 26, Gen. Laws, cap. 203, where a surplus of proceeds remains after sale, is to pay such surplus to the lessee, and the lessee has a valid claim against the individuals having such surplus in their possession and if the commissioners pay it over to the State treasurer, they do so of their own wrong and cannot claim exemption from suit by lessee on the ground that by their wrongful act the State has come into possession of money belonging to lessee.
- 3. In an action against the Shellfish Commissioners as individuals to recover the surplus proceeds from the sale of oyster leases after sale by the commissioners under Gen. Laws, cap. 203, § 26, the judgment would run against the defendants individually and the State not being a party; is not bound by it. Gladding v. Atchison, 69.

SOLDIERS' BONUS.

- Petitioner who was a member of the National Guard of the State April 6, 1917, was mustered into the Federal service by signing a Muster Roll, and was honorably discharged May 11, 1917. As a member of the National Guard he performed military service within the limits of the State in the nature of police duty.
- Held, that the Federal service performed by petitioner was not included within the provisions of the Bonus Act, cap. 1832, Pub. Laws, 1920. Brown v. Soldiers' Bonus Board, 483.

SPECIAL FINDINGS. See Trial, 2, 5-6.

STATE, ACTION AGAINST.

1. Whether or not an action is a suit against the State will be decided not by reference simply to the parties of record but upon consideration of the essential nature of the suit and the effect of the judgment therein. Gladding v. Atchison, 69.

See Actions, 1; Shell Fisheries, 1-3.

STATE, OFFICERS OF. See Banks and Banking, 3.

STATE ROADS.

See DEDICATION, 1-2.

See MUNICIPAL CORPORATIONS, 6.

STATUTES, CONSTRUCTION OF.

- 1. As the action given by Gen. Laws, cap. 283, § 14, is statutory, its construction in regard to details not expressly provided for by the terms of the act, unless a contrary intent appears therein, should be in accord and in harmony with the other laws of the state. Burns v. Brightman, 316.
- 2. In the construction of statutes, there is a presumption that they are intended to operate prospectively only and words ought not to have a retrospective operation unless they are so clear, strong and imperative that no other meaning can be annexed to them or unless the intention of the legislature cannot be otherwise satisfied. Jennings v. U. S. Bobbin & Shuttle Co., 388.

STENOGRAPHERS.

See TRIAL, 7.

STREET RAILWAYS. See Automobiles, 9-12.

SUNDAY.

See Constitutional Law, 12; Time, 1-2.

TAXATION.

- Although the tax had been properly assessed against each of several parcels
 of real estate, separately, all of the lots were sold by the collector of taxes as
 one lot for the total amount of taxes due on the different parcels.
- Held, the sale was illegal and passed no title, for the result of such action was to deprive the owner of his statutory right to redeem a particular part of his land if he so desired. Hebert v. Baker, 81.
- 2. "The tax act of 1912" was intended to operate prospectively, and as the corporate excess tax assessed June 1, 1912, was for the year 1912, the annual corporate excess tax assessed thereafter was for the year in which the tax was assessed, and consequently the tax assessed June 1, 1920, was for the year 1920, and where a corporation was not carrying on business for profit in this State during the year 1920, it was not liable for the tax assessed against it June 1, 1920. Jennings v. U. S. Bobbin & Shuttle Co., 388.

TIME.

- The established rule in this State in computing a period of time within
 which an act is to be done, is that unless a different intention is expressly or
 clearly indicated Sundays are counted, except when the last day falls on
 Sunday. Opinion of Justices, 275.
- 2. When the first day of a period is Sunday, that day should be included in the computation of time within which an act is to be done. Opinion to the Governor, 275.

See Constitutional Law, 12. See Landlord and Tenant, 4.

TOWN COUNCILS. See Probate Law, 1.

TRAFFIC REGULATIONS. See Constitutional Law, 4-9.

TRESPASS.

 A trespasser cannot relieve himself from liability by showing that a third person directed, ordered or authorized him to do the illegal act complained of. Semonian v. Panoras, 165.

TRIAL.

- The multiplication, without necessity of requests to charge is a hindrance, to the orderly procedure of a trial and tends to create confusion and to obscure the real issues in a case.
- 2. It is not the right of a party to have a special finding on every issue in a case and it was not error for the court to refuse to submit special findings, where the decision of such proposed issues would not be decisive of plaintiff's right nor necessarily affect the general verdict. Williams v. Allen, 14.
- 3. The rules of the superior court do not require that requests to charge be submitted before arguments to the jury, and the court should have received and rules upon requests presented after the conclusion of the arguments. Sears v. Bernardo, 106.
- 4. Refusal of requested instructions based on assumption of fact not warranted by the evidence was proper. *Prov. Ice Co.* v. *Bowen*, 173.
- 5. Gen. Laws, 1909, cap. 291, § 6, relative to the submission of special findings to the jury, relates to the submission of questions involving some material issue in a case and not to what is merely a controverted point in evidence.
- 6. The material issue in a case was whether the plaintiff and defendant had combined to obtain a monopoly with the unlawful intent of selling a commodity at an unreasonably high price; requests for special findings as to whether defendant's agent was endeavoring to get control of a sufficient quantity of the commodity to enable him to raise the price and whether plaintiff's agent was working with the defendant's agent to this end; were refused:—The jury were instructed that both parties were bound by the acts purposes intent and knowledge of their agents.
- Held, that the moving party was not prejudiced for the issue stated was the particular matter in controversy and was clearly explained in the charge and the question must have been intentionally answered in the general verdict. McNear v. Amer. & British Co., 190.
- 7. The intention of the statutes is that the court stenographer shall be present throughout the whole trial, except perhaps during the argument of counsel, so where a jury came in for further instructions which were given without a stenographer and in the absence of counsel, it constituted reversible error.
- 8. Rule 17 of the rules of practice of the Superior Court provides that before giving further instructions to the jury after they have retired, the trial

justice shall cause the attorneys, if absent, to be notified by sending notice to them if within convenient reach provided the attorneys have left word with the justice where such notice is to be sent and provided further that the justice shall not be required to wait more than fifteen minutes after sending such notice.—

- Held, that under the rule the court discharged its duty if notice is properly sent and is not responsible for its actual receipt.
- 9. Where counsel after the jury had retired, asked the court if he might go to his office and was told his presence in court was not required, and then stated to the court that he would go to his office and the court knew the location of his office and the attorney remained there but was not sent for when the jury returned for further instructions, the fact that he did not give his office address again is not important nor in the circumstances did his failure specifically to ask that he be called deprive him of his right to notice and failure on the part of the court to notify him, was error. Such error is not necessarily reversible if the court has preserved by any method a record of what was said or done in the absence of counsel. Macchia v. Ducharme, 418.

See AUTOMOBILES, 2-8.

See Exceptions, 7.

TROVER.

See Damages, 9.

TRUST FUNDS.

- 1. X. sold securities for Y. It was the duty of X. to obtain subscriptions and a check payable to Y. for the purchase price. After forwarding 60% of the price to Y., X. received from Y. the certificates which he delivered to customers. Y. was at liberty to reject any subscription. X. was required to indorse checks for collection and permitted to retain as commission 40% of the amount received from which 40% he paid all his expenses. X. opened a bank account in the name of "X. Manager" and no other money than checks received in payment of Y's stock went into the account. X. made weekly reports to Y. showing the amount of the subscriptions and amount remitted and accompanied by check drawn against the account for 60%, and a receipt from X. showing the receipt of his commission.
- Held, that there was no intention to create the relation of debtor and creditor between the parties and the fund was the property of Y. Garst v. Canfield, 220.
- 2. Where a trustee mingles in a bank account his own money with trust funds and then makes withdrawals for his own use he will be presumed to have used his own money to the extent that he had money in the account. If such withdrawals exceed the amount of his own money and he afterwards deposits other money of his own it will be assumed that it was his intention to make the trust fund whole. Garst v. Canfield. 220.

TRUSTS.

See WILLS, 4.

USURY.

See Equity, 1-5.

VERDICT, DIRECTION OF.

- 1. Where the evidence on an issue of fact is conflicting and a jury might find in favor of either party as they believed the testimony it is error to direct a verdict, for the question of the credibility of witnesses is in the first instance for the jury. Conant v. Furnace Improvement Co., 98.
- A verdict should not be directed for the defendant if on any reasonable view
 of the testimony, the plaintiff can recover, especially where the burden of
 proof is on the defendant. Semonian v. Panoras, 165.

See Exceptions, 12.

VERDICTS.

See Bonds, 1-2; Pleading, 4.

WARRANTIES.

See Contracts, 2-3.

WILLS.

- 1. Where the full enjoyment of a vested interest is postponed until the beneficiary arrives at his majority, unless the will shows an intention that the income upon such vested interest shall be accumulated and not paid to the beneficiary until he reaches his majority, he is entitled to receive the same as and when it accrues. N. E. Trust Co. v. Brown, 87.
- Under residuary clause, "all the rest and residue of my estate I give devise
 and bequeath to my said wife and to my sons and daughters their heirs and
 assigns, forever, share and share alike, per stirpes and not per capita;"—
- Held, the intention of the testator governs and is to be ascertained by consideration of the provisions of the entire will and to assist in getting his point of view, the circumstances existing at the time of the execution of the will are to be considered;
- Held, further, that from the language and structure of the will, the intention was clear that the wife and each child should take in equal shares under the residuary clause.
- Where in a will two phrases are irreconcilable that construction should be preferred which gives effect to the expression of intention made in plain and ordinary terms rather than in technical phraseology. Gee for an Opinion, 132.
- Testamentary provision "when the youngest child of my youngest son shall have reached the age of 21 years, then my said trustees are to divide, dis-

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- tribute and convey as in their judgment they shall deem best all said business capital . . . equally to said male children and daughters born subsequent to the date of this will, the children of any deceased child taking his proportionate share of his fathers and mothers realty and personalty."
- Held, that the time for division and distribution of the trust estate was postponed until it was no longer possible for the youngest son of the testator to have children and his then youngest child reached the age of 21 years. Harris v. Greene, 345.
- 5. By will executed in 1913; testator devised to each of three children a specifically designated parcel of land, of practically the same value; in 1915 another child X was born and thereafter testator purchased another parcel of land of about the same value as the other parcels; and frequently referred to the last parcel as a home he had provided for X. Testator never changed his will, which provided that one-third of the residue should go to his wife and "the remaining two-thirds to my children, the childrens' share, to be held in trust."
- Held, that in the absence of a testamentary devise or a conveyance or declaration of trust, X. did not obtain any special interest or share in the last parcel of land.
- Held, further that the gift to the children of a share in the residue being immediately operative upon testator's death, the members of the class coming under the designation of "my children" were to be ascertained at that time and the class included all of the four children of testator who survived him.
- 6. Where two provisions in a will, each in itself explicit, are inconsistent, and there is no specific or general intent apparent in the will excluding the conclusion that the primary intention was forgotten or changed, and there is no construction which will uphold both provisions, the later provision must prevail.
- 7. Where there is no general intent apparent in a will warranting such action, the court cannot harmonize the provisions of a conditional and an absolute devise by destroying the later absolute gift.
- 8. In one clause of a will testator requested that all the wood lots, timber lands and tillage lands be sold as soon as convenient at public auction and the proceeds become a part of the general estate out of which the legacies might be paid if necessary and in a later paragraph gave authority to his executors and trustees to sell both real and personal property at private sale or public auction.
- Held, that the "request" in the first clause was directory merely as to the time and manner of the sale of the lands therein referred to and that in the later clause power was given to the executors to sell the wood lots, timber lands and tillage lands either at private sale or public auction in their discretion.
- 9: Where testator named his wife and brother as joint executors and trustees and gave the residue one-third to his wife and two-thirds to his children, the provision to the children being in trust, and the wife and brother resigned as executors and complainant trust company was appointed adminis-

trator de bonis non with the will annexed, and the will authorized the executors and trustees to sell both real and personal estate at public auction or private sale and to invest the proceeds:

- Held, that the sale of the real estate was to be made in furtherance of the duties of the executors in settling the estate and there was nothing to indicate that the power to sell was given to the executors as individuals apart from their office and hence under Gen. Laws, cap 312, § 26, the trust company as administrator with the will annexed succeeded to the power of the original executors.
- Held, further, that as the power to sell was specifically given to the executors, by the testator, the administrator needed no special authorization for sale from the court. Industrial Trust Co. v. McLaughlin, 350.
- 10. It is reasonable to suppose that a man who makes a will does not intend to die intestate as to any part of his property.
- 11. Testator by will in the 5th and 7th clauses bequeathed gifts of \$10,000 and \$2,000 respectively, and by the 4th and 6th clauses bequeathed gifts of \$20,000 and \$10,000, respectively, in trust. By the 11th clause he directed his executor to sell all personal property not otherwise disposed of, also all real estate, the proceeds of said personal and real estate to be added to the 4th and 6th bequests, share and share alike, after all expenses of every description had been settled. At the time of his death the personal property of testator was less than \$5,000.—
- Held, that to carry out the apparent intention of testator the 11th clause would be construed to be a general residuary provision, and from the proceeds of the sales of the real and personal property the executor should pay the expenses, debts and legacies provided for by the will, first paying the expenses of administration, the inheritance and legacy taxes, and all lawful claims, and out of the balance the legacies, and if the estate was insufficient to pay the legacies in full they must abate proportionably. Ind. Trust Co. v. Gardner, 404.

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See EVIDENCE, 3.

WORKMEN'S COMPENSATION ACT.

- On petition of a widow for commutation of weekly payments under the Workmen's Compensation Act, the minor children of deceased must be joined as parties.
- Where the record shows no evidence on a ground alleged for commutation of weekly payments under the Workmen's Compensation Act, such claim will not be considered on appeal. Ciaccia v. General Fire Ex. Co., 109.
- 3. In a decree under the Workmen's Compensation Act, the Court found that the second wife of deceased was entitled to the total compensation, but by request and consent of said wife decree was entered providing that the amount should be divided in thirds between her and the two children of deceased by his first wife. The first wife appeared as the next friend of her two minor children and the decree provided that the payment for the children should be made to her to be applied to their support.

Held, that all of the parties being before the court it was competent for the second wife to assent to the decree which thereafter would be binding upon her.

Held, further, that as the children were parties through their next friend, the decree was binding upon them and the receipt of the next friend would be ample discharge to the respondent. Loiselle v. Pawtucket Ice Co., 474.

WRITS.

- 1. Under a writ of ne exeat, commanding the sheriff to cause the respondent to give bail or security, the sheriff was authorized to take a cash deposit in the amount named in the writ. Levine v. Levine, 61.
- Ordinarily the supreme court will restrict the use of extraordinary writs to their generally recognized offices but in any situation when no other remedy is provided it will so employ them as will most efficiently aid in the exercise of its revisory and appellate powers. McLaughlin v. McLaughlin, 429.

See Prohibition, Writ of.

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